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ABSTRACT

This report reviews the issues raised in revising the existing Texas child care licensing statute. The brief final report gives an overview of the history of the Day Care Licensing Review Project. Position papers concerning the major issues involved in a consideration of child care regulation in Texas form the bulk of this report and include: (1) consideration of statutory alternatives in the development of an effective legal framework for the licensure of day care facilities for children, including such concerns as period of licensure, provisional licensure, denial and revocation of licenses, and methods of enforcement; (2) review of alternative State roles in the regulation of private preschool education facilities in Texas; (3) discussion of the possible alternatives for regulating child care in Texas and description of several models for registration of family day care homes; and (4) consideration of the issues involved in fee charging for day care licensing. These issues were discussed at four regional forums attended by day care directors, lawyers, judges, educators, parents and child care professionals. Summaries of their responses to these position papers are included in the report, as well as transcripts of the original Texas child care licensing statute and the child care licensing act of 1975. (ED)

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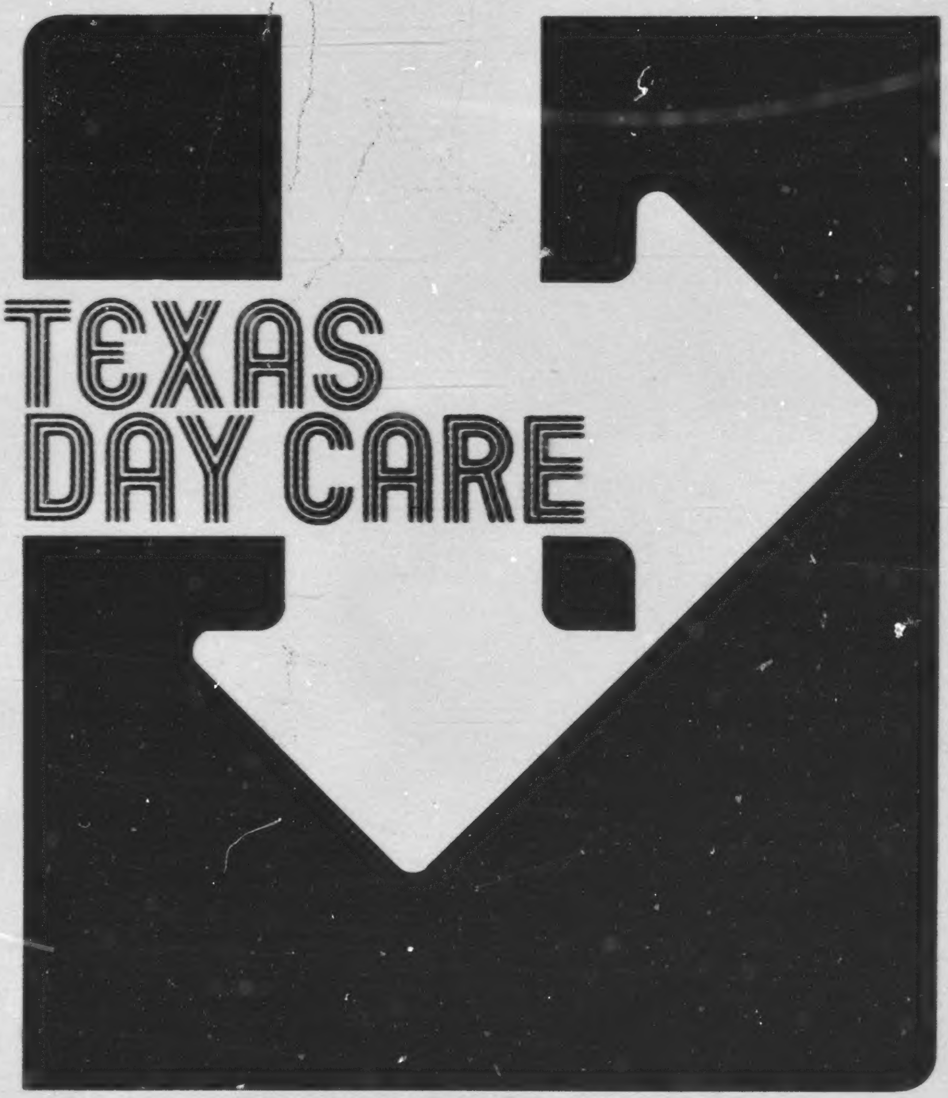

TEXAS DAY CARE

FINAL REPORT:
DAY CARE LICENSING REVIEW PROJECT

STATE DEPARTMENT OF PUBLIC WELFARE

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Final Report: Day Care Licensing Review Project

The Texas State Department of Public Welfare was the recipient, in late 1973, of a grant of $22,000 from the Children's Bureau to be utilized in the area of licensing or regulation of child care facilities. The availability of this grant was timely inasmuch as child care laws in Texas, as well as other children's services, were receiving a great deal of attention over the State. Moreover, the Texas Office of Early Childhood Development and the Texas Commission on Services to Youth had, within the year and a half previous, completed more than twenty forums over the State. These forums focused on other child and youth related issues but in relation to the subject grant had the impact of preparing and otherwise combining with other factors to pave the way for responsiveness and receptiveness of persons across Texas to issues related to regulation of day care.

Under the direction of Mr. Merle E. Springer, deputy commissioner for program administration acting as project director, the State Department of Public Welfare and the Office of Early Childhood Development of the Department of Community Affairs cooperatively sponsored a Day Care Licensing Review Project. The stated aim of the project was to cause a review of the Texas child care licensing statute (See Appendix I.), with emphasis on day care licensing, to identify positives and negatives in the statute, and to solicit widespread input and reaction to alternatives to identified negatives or weaknesses in the statute.

In early 1974, the departments obtained the expert services and thinking from persons noted for their knowledge of issues and concerns in the fields of child care and child care regulation. The agencies identified four major issues, and the consultants developed issue papers around the identified issues: (See Appendix II for papers.)

- Statutory Alternatives in the Development of an Effective Legal Framework for the Licensure of Day Care Facilities for Children. Paper by Ms. D. Carolyn Busch, attorney, Austin, Texas.
- Regulating Family Day Care Homes in Texas. Paper by Ms. Gwen Morgan, Day Care and Child Development Council of America, Boston, Mass.
- "Fee Charging in Day Care Licensing." Paper by Malcolm S. Host, executive director, Neighborhood Centers—Day Care Association, Houston, Texas.
- "Options in the Regulation of Pre-School Programs in Texas." Paper by Ms. Joyce Wilson, Texas Office of Early Childhood Development, in consultation with State Department of Public Welfare and Texas Education Agency.

Copies of the issue papers were mailed to more than 600 persons from many child-care related disciplines, as well as to members of the Texas Legislature. Arrangements were then made to hold four forums over the State in order to elicit face-to-face reactions to the issue papers. Each forum was conducted in such a manner that each participant who received the issue papers had the opportunity to react to each issue.

A summary of the papers and forum reactions, "Texas Day Care, A Summary View from the Community," reflects a readiness, on the part of the forum participants, for changes in the statute and a rather solid commitment to protection of all children in out of home care through some form of regulation. (See Appendix III for the Summary.)

Possibly the most significant result of the project is its contribution to the passage of a new child care licensing statute for Texas. (See Appendix IV.) In addition, the statute is reflective of many of the preferences stated by the forum participants. For example, there is no requirement for payment of a fee for a license. Also, one of the issues related to realistic methods for regulating family day homes; the new statute provides for "registration" as opposed to "licensing." Another concern was the absence from the current law of any penalties for unlawful operations. The new statute contains substantial penalties. Additionally, the forums sparked a much wider awareness on the part of the public at large of the existence of child care licensing and the problems and issues related thereto.

The Children's Bureau Grant, in summary, was used to carry out the democratic process. Problems related to the status quo were identified and aired. Information was gathered at the community level involving child care providers, professionals, and citizens at large. Alternatives were selected and submitted to the legislative process. The end result was a change in the status quo, in the direction of the intent enunciated in the process of carrying out this project.

LICENSING - CHILD-CARING AND CHILD-PLACING FACILITIES*

Article 695c, Vernon's Texas Civil Statutes**

Section 8(a). As used in this Act, the following terms, words and provisions shall be construed as defined and set forth herein.

1. Definitions.

(a) Child-Caring Institution. A child-caring institution is defined as any children's home, orphanage, institution or other place maintained or conducted, without profit, by any person, public or private association, or corporation, engaged in receiving and caring for dependent, neglected, handicapped or delinquent children, or children in danger of becoming delinquent, or other children in need of group care, and which gives twenty-four (24) hours a day care to more than six (6) children.

(b) Commercial Child-Caring Institution. A commercial child-caring institution is defined as any children's home, orphanage, institution or other place maintained or conducted, for profit by any person, public or private association, or corporation, engaged in receiving and caring for dependent, neglected, handicapped, or delinquent children, or children in danger of becoming delinquent, or other children in need of group care, and which gives twenty-four (24) hour a day care to more than six (6) children.

(c) Day Care Center. A day care center is any place maintained or conducted under public or private auspices, without profit, which cares for more than six (6) children during a part of the twenty-four (24) hours of the day.

(d) Commercial Day Care Center. A commercial day care center is any place maintained or conducted, for profit, under public or private auspices which cares for more than six (6) children during a part of the twenty-four (24) hours of the day.

(e) Commercial Boarding Home. A commercial boarding home is a private home or place of residence of any person or persons, which operates for profit, where six (6) or less children under sixteen (16) years of age are received for care and custody or maintenance, apart from their own family or relatives, for either part of the day or for twenty-four (24) hour a day care.

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* House Bill No. 15, Acts of the 51st Legislature, Regular Session, 1949, effective June 14, 1949, amended the licensing law and is the basis for the current licensing law. It was amended by House Bill No. 373, Acts of the 53rd Legislature, Regular Session, 1953, effective June 13, 1953; by House Bill No. 1061, Acts of the 59th Legislature, Regular Session, 1965; by House Bill No. 106, Acts of the 62nd Legislature, Regular Session, 1971; and by Senate Bill No. 1007, Acts of the 62nd Legislature, Regular Session, 1971.

** Section 8(a) of Article 695c, Vernon's Texas Civil Statutes, is a part of the Public Welfare Act of 1941, as amended. Section 8(a) was added to the Public Welfare Act by Section 1 of House Bill No. 15.

(f) Child-Placing Agency. A child-placing agency is hereby defined to mean any person, public or private association, or corporation, which assumes care, custody or control of one or more children under sixteen (16) years of age, and which plans for the placement of, or places, any child or children in any institution, foster or adoptive home, provided that natural parents of any such child or children are excluded from this definition.

Child-Placing Activity. Any person who arranges for the placement with a third party of a child not related to him, or aids or abets in such placement, shall be deemed to be engaged in a child-placing activity.

(g) Agency Boarding Home. An agency boarding home is a private home, caring for six (6) or less children, used only by a licensed child-placing agency, which agency has determined and has certified to the State Department of Public Welfare that such home meets minimum rules and regulations promulgated by the State Department of Public Welfare, and which agency shall provide supervision both for the boarding home and each child so placed therein.

(h) Convalescent Children's Boarding Home. A convalescent children's boarding home is any place under public or private auspices which gives twenty-four (24) hour-a-day care to six (6) or less children, who are physically handicapped, under medical and/or social supervision, away from their own homes, and not within a hospital.

(i) Convalescent Children's Foster Group Home. A convalescent children's foster group home is any place under public or private auspices which gives twenty-four (24) hour-a-day care to more than six (6) children who are physically handicapped, under medical and/or social supervision, away from their own homes, and not within a hospital.

(j) Solicitation of Funds. Solicitation of funds herein means the acts of any person, association, or corporation in soliciting or collecting any contributions in money or other property by appeals through mail, or by other direct or indirect public solicitation, for the purpose of operating any institution, agency, or facility coming within the purview of this Act.

2. Provisions for License to Operate

(a) Child-Caring Facility. Every person, association, institution or corporation, whether operating for profit or without profit, who shall conduct or manage a child-caring institution, agency, or facility coming within the purview of this Act shall obtain a license to operate from the State Department of Public Welfare, which license shall be in full force and effect until suspended or rescinded by the Department of Public Welfare as hereinafter provided.

(b) Child-Placing Facility. Every person, association, institution, or corporation, whether operating for profit or without profit, who shall conduct or manage a child-placing agency, who shall place any child or children who are under the age of sixteen (16) years, whether occasionally or otherwise, away from his own home or relative's home, shall obtain from the State Department of Public Welfare a license to operate as a child-placing agency, which license shall be in full force and effect until suspended or revoked by the Department of Public Welfare as hereinafter provided, except that nothing in this Act shall prohibit a natural parent from placing his own child or prohibit a grandparent, uncle, aunt, legal guardian, brother or sister, having attained their majority, from placing a child under the age of sixteen (16) years in the home of relatives or in a licensed institution, agency, or facility coming within the purview of this Act.

(c) Adoption. Every person, association or corporation, whether operating for profit or without profit, other than a natural parent, who shall place any child or children under the age of sixteen (16) years for adoption, whether occasionally or otherwise, shall obtain a license to operate in child-placing from the State Department of Public Welfare, which license shall be in full force and effect until suspended or rescinded by the State Department of Public Welfare as hereinafter provided.

(d) Free Choice of Agency. It is not the intent of this Act to deprive any person or persons of the right and privilege, except in instances where that right or privilege has been removed by court action, of choosing the licensed agency through which the child or children shall be placed for care or adoption whether the agency be private, public, or the State Department of Public Welfare; nor is it the intent of this Act to deprive any person or persons of the right and privilege of commencing and maintaining appropriate proceedings in a court of proper jurisdiction for custody or adoption of such child or children.

The State Department of Public Welfare shall maintain a complete list, or directory, of licensed child-caring and child-placing institutions and agencies, a copy of which shall be furnished any citizen of Texas upon request.

(e) Fees. (1) Child-placing agencies, in cases either of placement for adoption or of placement for care and custody, shall not be prohibited from charging a reasonable fee for placement, consultation or other child-placing activities either from the parents or other person responsible for the child involved or from the foster parents receiving the child; the natural parents, legal guardian, or foster parents may pay such agency a reasonable amount for staff and other services, board, maintenance, and medical care of such child and may reimburse the agency for medical care and maintenance plus staff and other services on behalf of the mother of such child in accordance with rules and regulations prescribed by the State Department of Public Welfare as hereinafter provided.

(2) License to operate, for each type of facility as herein defined, shall be issued without fee, and under such reasonable and uniform rules and regulations as the State Department of Public Welfare shall prescribe as hereinafter provided; and the type of facility for which a license is issued shall be indicated on such license.*

(f) Agency Boarding Home. When a person, association, institution, agency, or corporation is licensed to conduct or manage a child-placing agency, the boarding homes used by such agency for the care and custody of children who are under the agency's supervision are considered "agency boarding homes" and are not to be licensed separately by the State Department of Public Welfare, provided such agency boarding homes are designated as such in writing by such child-placing agency, with a copy of such written designation being sent to the State Department of Public Welfare; and provided further, that the State Department of Public Welfare is authorized to visit any such agency boarding home with a view of ascertaining whether the children cared for in such home are being properly cared for and properly supervised by such licensed child-placing agency. Agency boarding homes shall meet minimum uniform standards as prescribed by the State Department of Public Welfare as hereinafter provided, and any child-placing agency which uses homes falling below such standards shall be subject to suspension or revocation of its child-placing license as hereinafter provided.

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* As amended by House Bill No. 1061, Acts of the 59th Legislature, Regular Session, 1965 - Effective August 30, 1965.

3. Solicitation of Funds.

Licenses for solicitation of funds shall be issued to child-caring and child-placing facilities, under rules and regulations promulgated by the State Department of Public Welfare under processes hereinafter provided, and in keeping with the following provisions:

(a) Existing Facility. If funds are solicited for any institution, agency, or facility coming within the purview of this Act, a special license for solicitation, separate from the license to operate, must be obtained from the State Department of Public Welfare and, in addition, no solicitation of funds for institutions and agencies coming under the purview of this Act is to be undertaken in any county without the approval of the County Judge of such county, which County Judge shall authorize solicitation only for persons, association or corporations licensed by the State Department of Public Welfare to solicit funds; provided that:

(1) Any such organization, agency, association, institution, or corporation whose operation is state-wide in scope may be granted a special license by the State Department of Public Welfare to solicit funds on a state-wide basis without approval of the County Judge of the respective counties, except that each agent or solicitor representing any such licensed facility, who solicits on the street, or from house to house, or from place of business to place of business, or from person to person as encountered by chance in the course of such movements, shall obtain a license to solicit, shall carry his license with him, and shall display said license to solicit each time he makes a solicitation, which license must bear the approval of the County Judge of the county in which the solicitation is made.

(2) Any such organization, agency, association, institution, or corporation whose operation is less than state-wide in scope, may be granted a special license to solicit funds in the county, group of counties, or region of the State, which it serves without the necessity of securing approval of the County Judge of the respective counties; except that each agent or solicitor, representing any such licensed facility, who solicits on the street, or from house to house, or from place of business to place of business, or from person to person as encountered by chance in the course of such movements, shall obtain a license to solicit, shall carry his license with him, and shall display said license to solicit each time he makes a solicitation, which license must bear the approval of the County Judge of the county in which the solicitation is made.

(3)Nothing in this Act shall be construed to prohibit a religious or fraternal-order institution, agency, or facility coming within the purview of this Act, which is licensed by the State Department of Public Welfare and which is incorporated under the laws of the State of Texas as a non-profit facility and whose trustees or members of its corporate governing board are elected by, or are responsible to, a recognized fraternal order, church, or religious denomination or body, whose membership is state-wide, from soliciting funds; except that such agent or solicitor, representing any such licensed facility, who solicits on the street, or from house to house, or from place of business to place of business, or from person to person as encountered by chance in the course of such movements, shall obtain a license to solicit, shall carry his license with him, and shall display said license to solicit each time he makes a solicitation, which license must bear the approval of the County Judge of the County in which the solicitation is made.

(a) Nothing in this Act shall be construed to prohibit the officers, committees, or members of a recognized fraternal order or one of its local lodges, state-wide church, or one of its local congregations, religious body, or one of its local bodies from soliciting in behalf of their respective facility or facilities coming within the purview of this Act.

(4) Nothing in this Act shall be interpreted to interfere with the acitivities of civic, business or professional clubs in the operation of their civic or charitable functions, unless said club or organization actually engages in the operation of child-caring and child-placing facilities coming within the purview of this Act.

(b) Proposed New Facility. A person, association, agency, institution, or corporation, before soliciting funds for the establishment of a proposed new institution, agency, or facility coming within the purview of this Act must secure a license in order to solicit funds, which license is to be issued on the basis of a written contract between the State Department of Public Welfare and such person, association, agency, institution, or corporation, and as approved by the Attorney General of the State of Texas, which contract shall provide that a minimum amount of funds must be secured and held in escrow until the project is actually undertaken; provided that such contract shall not include any provisions for meeting any standards higher than, nor complying with any rules and regulations other than, those in effect for existing licensed facilities coming within the purview of this Act at the time said contract is entered into.

4. Authority to Inspect or Visit.

The State Department of Public Welfare shall have the authority to visit and inspect all such facilities embraced within this Act, whether licensed or unlicensed, at all reasonable times, to ascertain if same are being conducted in conformity with the law or if any conditions exist which need correction.

5. Records.

(a) Every person, agency, association, institution, or corporation coming within the purview of this Act, shall maintain such reasonable individual social records and individual health records; except day care centers, commercial day care centers, commercial boarding homes, agency boarding homes, and convalescent children's boarding homes, as defined in this Act, as are promulgated under the process hereinafter provided and said records shall be open for inspection by the State Department of Public Welfare at all reasonable times.

(b) Every person, agency, association, institution or corporation coming within the purview of this Act, except day-care centers, commercial day-care centers, commercial boarding homes, agency boarding homes, and convalescent children's boarding homes, as defined in subsection 1 (c), 1 (d), 1 (e), 1 (g), and 1 (h) of Section 1 of this Act, shall maintain statistical records and complete financial records of income and disbursements, and shall have its books audited annually by a licensed public accountant and shall submit, annually, a copy of such auditor's statement concerning receipts and disbursements to the Commissioner of the State Department of Public Welfare, or he may accept the financial report made to the fraternal order, church, religious or denominational body which owns or controls such licensed facility, or which is published in its official organ, handbook, or minutes in lieu of the said auditor's statement. It is further provided that every person, agency, association, institution or corporation coming within the purview of this Act, upon the written request of the Attorney General of the State of Texas, shall open its books for inspection by the Attorney General, to ascertain the honesty and legitimacy of its operation.

6. Children Improperly Cared For.

Whenever the State Department of Public Welfare has reason to believe that any person, association or corporation having the care or custody of a child subjects such child to mistreatment or neglect, or immoral surroundings, it shall cause a complaint or petition to be filed in the proper court and said Department may be represented by the Attorney General of the State of Texas in such a proceeding.

7. Denial, Suspension and Revocation of License.

(a) The State Department of Public Welfare is authorized to deny a license to a person or to an unincorporated or incorporated institution, agency, or association coming within the purview of this Act, if it or he is organized so loosely, poorly, and intangibly, or if it or he operates by such methods that said State Department reasonably concludes that the manner of organization and/or operation admits of probability of fraud being perpetrated. Appeal may be made for a hearing as provided elsewhere in this Act.

(b) The State Department of Public Welfare is authorized to suspend or revoke any license if it ascertains failure to comply with the law or with the reasonable rules and regulations provided for herein; provided that the following procedure is followed: (1) The State Department of Public Welfare, in writing, shall call to the attention of the licensee the particulars in which he fails to comply and shall specify a reasonable time by which it is probable that the licensee can remedy said failure; then, (2) if failure to comply persists, said Department shall give written notice of intention to suspend or revoke said license thirty (30) days thereafter if no appeal for a hearing is made by the licensee; (3) if, within said thirty (30) days, licensee files with the State Department of Public Welfare written request for a hearing, the matter then shall be referred to the Advisory Board, which shall conduct a hearing and render a written opinion, as elsewhere provided for in this Act; and (4) after receiving a copy of said opinion, the State Department of Public Welfare may proceed to suspend or revoke the license in question.

8. Advisory Board.

(a) In the event that any person, association, agency, corporation, or facility coming within the purview of this Act is denied a license to operate or solicit funds or said license to operate or to solicit funds has been suspended or revoked, said person, association, corporation, agency or facility shall have the right to appeal within a reasonable time, and upon filing written notice of appeal, said appellant shall be granted a reasonable notice and opportunity for a fair hearing before the Advisory Board created in this Act.

Within a reasonable time prior to the appellant's appeal hearing, he, or his authorized agent, shall be fully advised of the information contained in his record on which action was based if a request for such information is made in writing, and no evidence of which the appellant is not informed shall be considered by the Advisory Board or the State Department of Public Welfare as the basis for the decision after the hearing.

(b) The Advisory Board provided for herein shall consist of five (5) members appointed by the State Board of Public Welfare. The members shall be appointed at least thirty (30) days prior to the date set for the hearing and shall be comprised of the Executive Officers of institutions coming within the same classification as the appellant, provided that not more than one (1) member shall be appointed from any one (1) institution. When the Advisory Board is appointed, the Board shall immediately select its chairman and the chairman of the Board shall notify the appellant in writing of the date and place of the hearing, said hearing to be set within a period of not more than forty-five (45) days after the Advisory Board is notified of its appointment. Members of the Advisory Board shall serve on the Board without salary, but each member attending the appeal hearing shall be paid Ten Dollars ($10) per day for expenses, for each day in session, said payments being made by the State Department of Public Welfare out of its funds. The Advisory Board meeting shall be held in Austin or in the immediate vicinity of the appellant's residence.

(c) At the hearing all of the evidence shall be recorded verbatim, and a copy of the transcript shall be made available to the appellant and the State Department of Public Welfare, in accordance with rules and regulations promulgated by the Department of Public Welfare.

The Advisory Board shall make written opinions and recommendations to the State Department of Public Welfare within a period of ten (10) days after the hearing is closed and failure to make the report within the time prescribed may be considered by the State Board of Public Welfare as sufficient justification for the appointment of a new Advisory Board. These opinions and recommendations shall be advisory only, and shall not be binding upon the State Department of Public Welfare.

(d) Nothing in this Article 8 concerning Advisory Boards shall be interpreted to prevent any party involved from due recourse to the courts, and in case of flagrant violation of this Act which endangers either the health or welfare of the children in the institution or facility, the person, association, corporation, agency or facility may be temporarily enjoined from operation during the pendency of the appeal.

9. Promulgations of Rules and Regulations.

It is the expressed intent of this Act that the State Department of Public Welfare shall be given the right and the authority to promulgate reasonable rules and regulations governing the granting of licenses to the institutions and facilities coming within the purview of this Act, and for the suspension or revocation of such license for the operation of such institutions and facilities named in this Act, or for the solicitation of funds for the maintenance of such institutions and facilities; said rules and regulations shall be reasonable, and shall be uniform in nature. A copy of the rules governing the granting, suspension, or revocation of the licenses to operate or to solicit funds, which are currently used by the State Department of Public Welfare, shall be furnished to each person, organization, agency or facility contemplated in this Act and if the State Department of Public Welfare makes changes or revisions in said rules and regulations, copies of the proposed changes shall be sent to each person, association, corporation, agency or facility coming within the purview of this Act at least sixty (60) days prior to the effective date of the proposed changes or revisions in order to enable those persons, associations, corporations, or agencies affected an opportunity to review the proposed changes and make written recommendations or suggestions concerning them, if desirable.

9a. Rules Relating to Immunization of Children.*

(a) The State Department of Public Welfare shall promulgate rules and regulations relating to the immunization of children admitted to institutions and facilities covered by this Act. The rules shall require the immunization of each child at an appropriate age against diphtheria, tetanus, poliomyelitis, rubella, rubeola, and smallpox, and such immunization must be effective upon the date of first entry into the institution or facility; provided however, a person may be provisionally admitted if he has begun the required immunizations and if he continues to receive the necessary immunizations as rapidly as is medically feasible. The State Department of Health shall promulgate rules and regulations relating to the provisional admission of persons to institutions and facilities covered by this Act. The State Board of Health may modify or delete any of the immunizations listed in this Section or may require immunization against additional diseases as a requirement for admission to institutions and facilities covered by this Act, provided, however, that no form of immunization shall be required for a child's admission to an institution or facility if the person applying for the child's admission submits either an affidavit signed by a doctor in which it is stated that, in the doctor's opinion, the immunization would be injurious to the health and well-being of the child or any member of his family or household, or an affidavit signed by the parent or guardian of the child stating that the immunization conflicts with the tenets and practice of a recognized church or religious denomination of which the applicant is an adherent or member.

(b) Each institution or facility covered by this Act shall keep an individual immunization record for each child admitted, and the records shall be open for inspection by the State Department of Public Welfare at all reasonable times.

(c) The State Department of Health shall provide the required immunizations to children in areas where no local provision exists to provide these services.

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* Section 9a (a), (b), (c) added by House Bill No. 106, Acts of the 62nd Legislature, Regular Session, 1971, as amended by Senate Bill 1007, Acts of the 62nd Legislature, Regular Session, 1971, effective June 15, 1971.

10. State Institutions Exempt.

Child-caring and child-placing institutions and agencies, which are owned and operated by the State of Texas, are exempt from the licensing and regulatory provisions of this Act; except that this provision shall not prevent the State Department of Public Welfare, or the Board which controls a state-owned child-caring or child-placing institution or agency, from requesting the State Department of Public Welfare, or an Advisory Board composed of the Executives of licensed institutions, to give counsel, to be expressed in a written opinion, on any matter which might contribute to the efficiency of said institution or agency, and hence might be in the public interest.

11. Injunction.

Any person, association, or corporation, for cause, may be enjoined from soliciting for, or conducting, or managing any institution, agency, or facility coming within the purview of this Act through suit brought by the Attorney General of the State of Texas, or by the county attorney or district attorney, in the county where such illegal practices occur.

12. Misdemeanor.

It shall be a misdemeanor for any person to impersonate an official, employee, representative, agent, or solicitor of any licensed institution or agency coming under the purview of this Act; and it shall be a misdemeanor for any person falsely to represent himself as representing any such licensee; and it shall be a misdemeanor for any unauthorized person to solicit funds in the name of, or for, any such licensee; and upon conviction in any justice, county, municipal, or district court of Texas, a person guilty of any such misdemeanor may be fined not to exceed One Hundred Dollars ($100) and/or imprisoned in county or municipal jail for not over one (1) year, for each such separate act.

APPENDIX II

STATUTORY ALTERNATIVES IN THE DEVELOPMENT OF AN EFFECTIVE LEGAL FRAMEWORK FOR THE LICENSURE OF DAY CARE FACILITIES FOR CHILDREN

Prepared by D. Carolyn Busch
State Department of Public Welfare

CONSIDERATION OF STATUTORY ALTERNATIVES IN THE DEVELOPMENT OF AN EFFECTIVE LEGAL FRAMEWORK FOR THE LICENSURE OF DAY CARE FACILITIES FOR CHILDREN

During the past year considerable attention has been directed toward the quality and availability of child care in Texas and other states. The protection of children is not a concern of recent origin. The movement for the protection of children gained momentum in the nineteenth century and in 1909 President Theodore Roosevelt called the first White House Conference on the care of dependent children. That conference, as well as the White House Conference of 1930, which produced the Children's Charter. wrestled with many of the same problems which still exist today, yet some sources only superficially versed in the child care field are attempting to reinvent the wheel, figuratively speaking, when they purport to present problems never before recognized nor addressed. The Children's Charter recognized the rights of the child as the first rights of citizenship. The fourteen articles of the Charter set forth visionary and idealistic goals which, though not yet totally accomplished, are still appropriate.

The Children's Charter of 1930, written long before the Civil Rights Movement was ever conceived, concluded, "For every child these rights, regardless of race, or color, or situation, wherever he may live under the protection of the American flag.[1] The failure to solve the problems of children both in and outside their own homes is due largely to public apathy and a lack of legislative, executive and law enforcement commitment to these ideals.

Need for Expression of Legislative Intent

There has long been debate over the question of whether the licensing of children's facilities should be strictly an enforcement function or a program of combined efforts to regulate and simultaneously upgrade the quality of child care. In the past there has been little expression of legislative intent to resolve this question and there is a distinct need for the Legislature to make known the goals it seeks in the program of licensing of children's facilities.

If a stance of strict enforcement is adopted, then the statute and regulations must be enforced uniformly and even-handedly in all areas of the state. In some instances in the past the Department of Public Welfare has met with stubborn resistance in applying regulations and standards to day care facilities in some communities, especially where significant financial expenditures were required to bring such facilities up to standard. This must be considered in making the policy decision of whether the Welfare Department is to serve strictly as a regulatory agency or in the dual capacity of regulating as well as assisting in developing and upgrading much needed resources for children.

Texas' statute on the licensing of child caring facilities, Article 695c§8(a), Vernon's Texas Civil Statutes, has not had a major overhaul since its passage in 1949. It is outmoded, ambiguous in its scope and definitions and especially needs a more swift and certain procedure for revocation or denial of a license.

There is a critical need for a clearer delineation of responsibility for enforcement of the licensing provisions and a need for a mechanism for issuance of a provisional or "start-up" license. Obviously, of course, before any statutory scheme for enforcement of licensure can be successful, there must be adequate funding to staff and administer such a program. If it is the decision of the legislative body that regulation of all types of child care facilities is not possible within available funding, then it is imperative that the Legislature make a selection of priorities as to which facilities most critically require regulation. Some questions such as whether or not to license family day care homes will be discussed elsewhere, but these decisions must be made prior to developing the statutory framework.

Another question which must be decided is the question of the proper agency to administer the licensing program. The licensing authority in most states (84%) is the department of welfare or its equivalent.[2] Though there may be some debate as to the licensure of children's institutions for psychiatric and/or drug related problems, it seems clear that the Welfare Department is an appropriate agency to administer the licensure of day care facilities.

"Models for Day Care Licensing" addresses the question of the proper placement of the day care licensing function:

The licensing function should be carried by a state agency which has a major interest and responsibility for comprehensive services to children and their families. The legislature in each state can best identify that agency.

It is not appropriate for day care facilities to be licensed by a state agency having responsibility for granting a wide variety of occupational, business and other licenses.[3]

Time-Limited or Continuous License?

One of the weaknesses of the Texas statute is the fact that once a license is issued it is valid until revoked. Interestingly enough, Texas is the only state which uses this method of licensure. In all other states the license is issued for a definite period of time and prior to the conclusion of that term, the license must be renewed. The following table, showing that 44 states issue a license for a period of one year, provides a breakdown of the number of states and the term for which a license is valid.

TERM LICENSE IS VALID (50 STATES RESPONDING)[4]

TERM	CENTER		HOME	
	number of states	percent of states	number of states**	percent of states***
1 year	44	88	36	92
2 years	4	8	2	5
3 years	1	2		
indefinite*	1	2	1	2
	50	100%	39	100%

*Texas makes annual revalidation checks, but license does not expire; it must be revoked.

**Excludes 11 states in which licensing of family day care homes is not mandatory.

***Based on 39 states with mandatory licensing of family day care homes.

One advantage of having a license with a definite term is that it places a requirement on the licensee to perform certain tasks by a specific date in order to obtain a renewal of the license. This is contrary to the present Texas statute which provides that a license is good until revoked. There are both psychological and legal differences in the two approaches. In law this distinction is known as a shift in the burden of proof. That is, under the method of using a time-limited license, the burden of proof shifts to the licensee to establish that he is entitled to a renewal of his license. Whereas, under the existing statutory provision in Texas, the license is good until revoked, which shifts the burden of proof to the Welfare Department to establish that the licensee is not entitled to a continuation of his license. In terms of enforcement, it would be more advantageous to the state to have a time-limited license.

One disadvantage of using a time-limited license may be increased administrative cost. If the state places a time limit on the license, such as one year (which is the period of time used by 88% of the states), then it will be necessary to have sufficient staff to complete the renewal process prior to the expiration of the license. If sufficient administrative staff were not available to study and process license renewals on an annual basis (or whatever time period is established), then the agency would have only two alternatives: (1) to perfunctorily renew the license without an adequate study, or (2) permit the license to expire. In the latter event the facility then would have to cease operation or operate without a license through no fault of its own. Either of these alternatives would be unacceptable.

From the preceding chart it is noted that no states renew licenses more often than once per year. The great preponderance of states use a term of one year for licenses. Four states issue licenses which are good for two years; one state issues a license good for three years. As stated above, Texas is the only state which grants a license which is perpetual unless revoked.

The primary disadvantage of having a license which must be renewed on or before a given date is the dependence of the licensing agency on other government offices which perform functions which are essential to the licensing process but which are beyond the control of the licensing agency. Delays in the licensing process attributed to other government offices by state licensing agencies and the approximate average number of days' delay are as follows:[5]

Delays attributed to:

Fire Inspection	65 days
Sanitation Inspection	35 days
Health Inspection	35 days
Zoning	50 days

These delays can be cumulative.

Central control of the speed of licensing is weakened by the layers of local zoning, building, etc., requirements, which are out of the jurisdiction of the licensing agency, and by reliance on the cooperation of inspecting agencies which give low priority to day care inspections.[6]

In considering whether or not to institute the use of a time-limited license, as opposed to a license with an indefinite term, the state should consider the administrative cost in terms of tasks which are necessary in restudying and reissuing licenses. Approximately 15 to 20 major work tasks are required of an applicant in the licensing process, assuming that all regulations are met on the initial attempt and that second and third inspections are not necessary. When the tasks of government officials are included, the total number of tasks in a typical licensing process approximates 50 to 75. If reinspections are required, or other licensing problems occur, in excess of 100 tasks may need to be performed by the applicant and a variety of agencies at different levels of government.[7]

John L. Hill, Attorney General of Texas, recommends that consideration be given to affixing a date on all licenses, upon which date the license would expire. "If a fixed date process were used, this would be calculated to provide more assurance that minimum standards were always being met. The license could be renewed if it could be shown that minimum standards were being met on the renewal date. It is suggested that a license should expire after two years."[8]

Need for Issuance of Provisional License

One of the difficult dilemmas faced by both the licensing staff of the Department of Public Welfare and persons who are attempting to establish new day care facilities is the fact that the present licensing statute does not allow the issuance of a provisional or temporary license which would permit the commencement of the program without compliance with all licensing provisions. It is obvious that many of the day care standards cannot be met until the program is in actual operation. Thus, under the present statute DPW is placed in the position of attempting to ascertain from a "paper plan" whether or not standards will be met. Under the structure of the present statute DPW must issue a license to operate before the facility can even commence its start-up activities. This is an unrealistic approach and places the DPW licensing staff at a distinct disadvantage if the facility does not comply with standards when it has been issued a license to operate.

The Attorney General also sees merit in the issuance of a temporary license, stating "It is suggested that consideration be given to preparation of legislation which would allow the DPW to issue a temporary license or permit to operate. If it came to the attention of the Department that one were operating without a license but did in fact desire a license, this provision would allow the Department to authorize operation for a limited period of time . . . ."[9]

The Model State Day Care Licensing Act published in Guides for Day Care Licensing[10] includes a provisional license. A provisional license is defined as "a license issued to an operator of a new day care facility, or to the central operator of a new day care system, authorizing the licensee to begin operations although the licensee is temporarily unable to comply with all of the requirements for a license." The Model Act further provides "If the results of the investigation satisfy the Department that all of the applicable rules and regulations cannot be met immediately but can and will be met within six months or less, and the deviations do not threaten the health or safety of the children, then a provisional license or provisional approval shall be issued for a period not to exceed six months from the date of such issuance." The commentary included in the draft of the Model Day Care Licensing Statute reads as follows:

> The text contemplates that a provisional license often would be issued when a facility begins operation. Many

new day care facilities will not immediately meet all requirements. A provisional license will enable the facility to start. Further, it would give the license issuers time to inspect such a new facility in operation without clothing the operator with the full protection of a regular license.[11]

Provisions for Denial, Suspension and Revocation

Attorney General Hill has stated to the Legislature "Statutory criteria for denying or revoking a license should be more clearly set forth."[12]

The present procedures prescribed by the statute are cumbersome and lengthy. The Attorney General further states, "There appears the necessity for redefining the circumstances under which the department should deny a license. Those circumstances presently set forth in the statute do not closely parallel with the present minimum standards of the department. The present denial paragraph states that 'appeal may be made as provided elsewhere in this Act.' This reference is apparently made to the appeal process for revocation and suspension. The denial paragraph should have its own appeal provisions since there is not a complete parallel with regard to appealing from revocation. For example, the appellate process on revocation states that written notice of intention to revoke the license 30 days thereafter should be given if failure to comply persists. Such provision would not be applicable to denial. This is only one example. A de novo right of appeal should be provided. The use of the advisory board in the appeal process should be dropped." [13]

It is suggested that the provisions of the Model State Day Care Licensing Act[14] dealing with denial, suspension and revocation of licenses and appeals therefrom be considered for adoption in Texas. Sections 4, 5 and 10 of the Model Act are included as Appendix A.

There is one especially significant court decision in Texas construing the present licensing law, Small v. State of Texas, 360 S.W.2d 443 (Civ.App.1962). In that case the Court of Civil Appeals upheld the decision of the trial court in enjoining the defendants from operation of a day care center on the basis that it did not have a license to operate. The trial court refused to admit evidence of whether or not the facility should have been licensed; i.e., the court did not "go behind" the decision of the administering agency (DPW) in denying the license.

Designation of Legal Authority to Enforce Licensing Statute

Texas' present licensing statute provides that any person, association or corporation, for cause, may be enjoined from soliciting for, or conducting, or managing any institution, agency or facility coming within the purview of this Act through suit brought by the Attorney General of the State of Texas, or by the county attorney or district attorney, in the county where such illegal practices occur.[15] The Attorney General has stated, ". . . the complaint or petition may be filed by the Attorney General. The language is permissive . . . ."[16]

The lack of clarity relating to legal responsibility is further illustrated in another report of the Attorney General, which states:

> It should be made clear either by statute or by regulation what type of "complaint" or "petition" shall be filed. The word "complaint" connotes criminal jurisdiction, jurisdiction that the Attorney General does not have. Nevertheless, the present statute states that the Department "may be represented by the Attorney General." It is probable that the type of "petition" referred to is for injunctive relief. This should be clarified in this subsection. It should also

be clear that the Department may be represented by the County Attorney or the District Attorney or the Attorney General, in light of the injunction provision now contained in Subsection 11.[17]

The need for clear authority is emphasized in Guides for Day Care Licensing" :[18]

> Although most states presently operate day care licensing programs under the authority of state statutes, experience has shown that, when legally challenged, many of the statutes prove to be deficient. Clear authority is needed in state legislation for the day care licensing agency to deny or revoke licenses and to initiate action in the courts against those facilities which continue to operate after their licenses have been denied or revoked.

There are at least four possible sources of legal counsel for instituting injunctive actions to close unlicensed or noncomplying day care facilities. They are (1) the Attorney General of Texas, (2) the district attorney, (3) the county attorney, (4) legal staff of the Department of Public Welfare.

There are relative advantages and disadvantages to each of the above alternatives. It seems clear, however, from all past experience that there is a need for a statutory provision which makes it obligatory on one certain specific official or agency to carry out the legal responsibilities for enforcing the licensing statute.

In past years there has been wide disparity in the degree of cooperation and the receptiveness of local district attorneys and county attorneys in bringing actions against local facilities which do not comply with the licensing act. This varies greatly depending upon the ethnic and economic conditions of the community and local public opinion regarding the necessity for licensing. An elected official such as the district or county attorney is sometimes reluctant to bring legal action against a local day care facility, especially if it has the support of parents and the local community. Substandard facilities often are operated by untrained or elderly persons with no other means of support. In this context it is appropriate to emphasize again that if the legislative branch mandates strict enforcement of licensing requirements, such enforcement must be applied uniformly.

The day care licensing study, Phase I, conducted by the Office of Child Development and the Office of Economic Opportunity, Department of Health, Education and Welfare, recommends "State day care legislation should give the state licensing agency adequate authority to deny or revoke licenses and to initiate action in the courts against those facilities which continue to operate after their licenses have been denied or revoked."[19] (underscoring supplied)

The Texas Constitution provides that the Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party and "perform such other duties as may be required by law."[20] The present licensing act gives the Attorney General permissive authority to bring injunctive proceedings against facilities which are violating the statute. Similar authority is given to district and county attorneys. Statutory responsibility for bringing these actions could be given to any one of the four entities mentioned above, i.e., the Attorney General, the district attorney, county attorney, or the Department of Public Welfare without violating the Constitution. In any event, whichever agent is selected to bring legal action, there needs to be designated staff adequately funded for this purpose if strict enforcement is desired by the Legislature. There will be a significant volume of such cases throughout the state. It would appear appropriate that this function be carried by an authority which receives state funding since this is deemed to be a state-federal function rather than a local-county function.

The 63rd Legislature, Regular Session, adopted an act providing a misdemeanor penalty for conducting a child caring institution, a commercial child caring institution or a child placing agency, or for placing a child for adoption without a license.[21] No such penalty exists for operating a day care facility and the present licensing statute provides only for injunctive action against a non-complying facility. Consideration should be given to broadening the misdemeanor criminal provision to include day care facilities.

Enforcement is the primary problem to be considered in determining whether or not to impose a criminal sanction against a day care facility operating without a license. The resolution of this question is closely tied to the decision of whether to license family day homes or to institute a registration system in lieu of a license. There are literally thousands of private residences throughout Texas in which children are being cared for without a license from the Welfare Department. These are usually instances in which the caregiver is providing day care for only a few children, usually from one to six, and either is not aware that a license is required or simply has avoided applying for a license and has been undetected by the licensing authority. Further, these are frequently situations in which licensing requirements are not or cannot be met.

The Model State Day Care Licensing Act[22] suggests a misdemeanor punishment for operation of a day care facility or a day care system without a license. The criminal penalty is in addition to provisions authorizing injunctive action where serious harm to children is threatened or where the operator has repeatedly violated the act or rules and regulations of the administering agency.

The inclusion of a misdemeanor punishment for operating a day care facility without a license would unquestionably strengthen the regulatory powers of the administering agency. When a day care facility was discovered to be in operation without a license, the administering agency would call this to the attention of the law enforcement authorities and/or sign a complaint. This procedure probably would have greater impact and force with day care operators than the mere threat of an injunction.

Again, the decision as to whether or not to impose a criminal sanction against the operation of a day care facility without a license is a value judgment. This judgment cannot be made without first determining the role of the administering agency and the staffing of law enforcement agencies throughout the state which would be responsible for processing the volume of misdemeanor charges if such a provision were strictly enforced.

SECTION 4.

a) An applicant who has been denied a license by the Department shall be given prompt written notice thereof by certified or registered mail to the address shown in the application. The notice shall contain a statement of the reasons for the denial and shall inform the applicant that there is a right to appeal the decision to the Director in writing within 30 days after the mailing of notice of denial. Upon receiving a timely written appeal the Director shall give the applicant reasonable notice and an opportunity for a prompt hearing before an impartial hearing examiner with respect to the denial of the application. On the basis of the evidence adduced at the hearing, the hearing examiner shall make the final decision of the Department as to whether the application shall be granted either for a license or a provisional license or denied.

b) An applicant who has been denied approval by the Department shall be given prompt written notice thereof, which shall include a statement of the reasons for the denial. The notice also shall inform the applicant that it may, within 30 days after the mailing of the notice of denial appeal the denial by making a written request to the director for an opportunity to show cause why its application should not be denied. Upon receiving a timely written request the director shall give the applicant reasonable notice and an opportunity for a prompt, informal meeting with the director or his designee with respect to the denial of the application and an opportunity to submit written material with respect thereto. On the basis of the available evidence, including information obtained at the informal meeting and from the written material, the Director shall decide whether the application shall be granted for approval, provisional approval or denied. The decision of the Director shall be in writing, shall contain findings of fact and rulings of law, and shall be mailed to the parties to the proceedings by certified or registered mail to their last known addresses as may be shown in the application, or otherwise.

Failure of the Department to approve or deny an application within 90 days shall be deemed to be a denial of license or approval and entitles the applicant to appeal.

SECTION 5.

a) The Department shall have power to suspend, revoke, or make probationary a license or approval if a licensee or approved operator is found not to comply with the rules and regulations of the Department respecting day care facilities or day care systems. In the case of a day care system, the license or approval may be suspended, revoked or made probationary in whole, or in part with respect to those day care facilities affiliated with the system which are found not to comply with the applicable rules and regulations.

b) A licensee or approved operator whose license or approval is about to be suspended, revoked or made probationary shall be given written notice by certified or registered mail addressed to the location shown on the license or approval.

The notice shall contain a statement of and the reasons for the proposed action and shall inform the licensee or approved operator that there is a right to appeal the decision to the director in writing within 10 days after the mailing of the notice of the proposed action. In the case of a license, upon receiving a timely written appeal the director shall give the licensee reasonable notice and an opportunity for a prompt hearing before a hearing examiner with respect to the proposed action. On the basis of the evidence adduced at the hearing, the hearing examiner shall make the final decision of the Department as to whether the license shall be suspended, revoked or made probationary.

In the case of an approval, upon receiving a timely written appeal, the director shall give the approved operator reasonable notice and an opportunity for a prompt, informal meeting with the Director or his designee with respect to the proposed action, and an opportunity to submit written material with respect thereto. On the basis of the available evidence including information obtained at the informal meeting and from the written material, the Director shall decide whether the approval shall be suspended, revoked or made probationary. The decision of the Director shall be in writing, shall contain findings of fact and rulings of law, and shall be mailed to the parties to the proceedings by certified or registered mail to their last known addresses as may be shown in the application, or otherwise. If no timely written appeal is made, the license shall be suspended, revoked or made probationary as of the termination of the 10 day period.

Provided, however, that if the Director finds that the health or safety of the children so requires, he shall order the immediate suspension of the license or approval. The licensee or approved operator shall be given written notice of the order by personal service or by certified or registered mail addressed to the location shown on the license or approval. The notice shall contain a statement of the reasons for the suspension and shall inform the licensee or approved operator that there is a right to petition the Director to reconsider the order. The petition shall be in writing and shall be made within 10 days after the personal service or the mailing of the order. In the case of a license, upon receiving a timely written petition, the Director shall give the licensee or approved operator reasonable notice and an opportunity for a prompt hearing before a hearing examiner with respect to the order of suspension of the license or approval. On the basis of the evidence adduced at the hearing, the hearing examiner shall make the final decision of the Department as to whether the order of suspension shall be affirmed or reversed.

In the case of an approval, upon receiving a timely written petition, the Director shall give the approved operator reasonable notice and an opportunity for a prompt, informal meeting with the Director or his designee with respect to the proposed action, and an opportunity to submit written material with respect thereto. On the basis of the available evidence, including information obtained at the informal meeting and from the written material, the Director shall decide whether the order of suspension shall be affirmed or reversed. The decision of the Director shall be in writing, shall contain findings of fact and rulings of law, and shall be mailed to the parties to the proceedings by certified or registered mail to their last known addresses as may be shown in the application, or otherwise.

c) At the hearing provided for by this section or by Section 4, the applicant or licensee may be represented by counsel, and has the right to call, examine and cross-examine witnesses. The hearing examiner is empowered to require the presence of witnesses and evidence by subpoena on behalf of the appellant or Department. Hearing examiner decisions shall be in writing, shall contain findings of fact and rulings of law, and shall be mailed to the parties to the proceedings by certified or registered mail to their last known addresses as may be shown in the application, or otherwise.

SECTION 10. Any final decision of the Department made by a hearing examiner after a hearing, or by the Director after an informal meeting and review of the available evidence, may be appealed by a party to the hearing or the informal meeting to the ____________ Court for review [by commencement of a civil action] within ______ days after the mailing to the party of the notice of the decision. The review shall not consist of a trial *de novo*. The findings of the hearing examiner or the Director as to any fact, if supported by substantial evidence, shall be conclusive. The Court shall have power to enter judgment upon the pleadings and a certified transcript of the record which shall include the evidence upon which the findings and decision appealed are based.

END NOTES

1. *White House Conference on Child Health and Protection,* The Century Co., 1930.

2. "State and Local Day Care Licensing Requirements," Office of Child Development, DHEW, August 1971, p. 5.

3. "Models for Day Care Licensing," A Model Day Care Facility Licensing Statute developed as part of an overall day care licensing study, Office of Child Development, Office of Economic Opportunity, DHEW, Wash. 1971, p. 4.

4. "State and Local Day Care Licensing Requirements, " *op. cit.*, p. 20.

5. "State and Local Day Care Licensing Requirements," *op. cit.*, p. 5.

6. "State and Local Day Care Licensing Requirements, *op. cit.*, p. 6.

7. "State and Local Day Care Licensing Requirements, *op. cit.*, p. 5.

8. *Report of John L. Hill, Attorney General of Texas,* in re Proposed Legislative Changes Affecting Child Caring Institutions (September 1973), p. 3.

9. *Ibid.*

10. "Guides for Day Care Licensing," DHEW Publication No. (OCD) 73-1053, p. 3.

11. "Models for Day Care Licensing," OCD, OEO of DHEW, May 1972, p. 4.

12. Report of John L. Hill, Attorney General of Texas, op. cit., p. 3.

13. Report of John L. Hill, Attorney General of Texas, op. cit., pp. 4-5.

14. "Guides for Day Care Licensing," op. cit., pp. 11, 12, and 14.

15. Article 695c, §8(a), subsection 11, V.T.C.S.

16. Report of John L. Hill, Attorney General of Texas, in re The Licensing of Artesia Hall by the State Department of Public Welfare (September 1973), pp. 5-6.

17. Report of John L. Hill, Attorney General of Texas, op. cit., p. 4.

18. "Guides for Day Care Licensing," op. cit., p. 5.

19. "State and Local Day Care Licensing Requirements," op. cit., p. 6.

20. Texas Constitution, Art. IV, §22.

21. H.B. 331, Acts, 63rd Legislature, 1973.

22. "Guides for Day Care Licensing," op. cit., p. 13.

OPTIONS IN THE REGULATION OF PRESCHOOL PROGRAMS IN TEXAS

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OPTIONS IN THE REGULATION OF PRESCHOOL PROGRAMS IN TEXAS

ISSUE: What role should the State play in the regulation of private educational facilities for preschool children?

BACKGROUND

The Law

The current licensing law (Section 8a, Article 695c, Vernon's Texas Civil Statutes, 1949) makes no specific reference to private preschool educational facilities such as nursery schools and kindergartens. It only defines a day care center as "any place maintained or conducted under private auspices, with or without profit, which cares for more than six children during a part of the 24 hours of the day." The law also says that facilities owned and operated by state agencies are exempt from licensing, and since independent school districts are considered arms of the state, they are included in this exemption.

A 1947 Attorney General Opinion (No. V-327) answered the question the Department of Public Welfare had asked about its responsibility for licensing private kindergartens under a 1929 law that was in force at that time. A summary of that Opinion is as follows:

"Private kindergartens established for the

> purpose of pre-school education of young children, at which such children attend only a few hours a day, are not required to be licensed as places 'for the care and custody of children under fifteen years of age' within the meaning of Article 4442a, Vernon's Civil Statute (requiring the licensing of day nurseries by the State Board of Health)." (This 1929 law was amended in 1931 to give the responsibility to the Division of Child Welfare which became part of the Department of Public Welfare when it was created in 1939. The amended law was replaced by the current law in 1949.)

In letters dated July 2, 1973, and July 24, 1973, DPW asked the Attorney General several questions about its licensing authority and policies, including one about the licensing of "bona fide educational facilities."

In his Opinion No. H-104 dated September 14, 1973, the Attorney General referred to Opinion No. V-327 and noted that although it "construed an earlier but similar statute and was confined to a consideration of kindergartens," he believed that "it is based upon sound reasoning and would apply to the broader subject matter" of "bona fide educational facilities." He further stated that "you (DPW) are advised that bona fide educational institutions do not require licensing by your department even if some child care is incidental to their operation" and that "the fact that education is an incident to the operation of an institution whose primary function is child care would not exempt that institution from licensing." The Opinion said that the determination of a facility's primary function would have to be made by DPW in each individual situation and that a facility with education and child care as equally important purposes would require licensing. It went on to say that the Attorney General's Office could not anticipate all of the possible variations in the education/day care situation and that it was properly the job of DPW to establish criteria to use in making the distinction.

DPW Policy

In order to carry out its statutory licensing responsibilities as clarified by the Attorney General, DPW has developed certain policies. In 1957 a section of the DPW Licensing Handbook listed the criteria for licensing workers to use in determining whether or not a facility was educational and not subject to licensing. The criteria were the ages of the children (3-6 years), the length of the daily program (less than four hours), the qualifications of the teachers, and the curriculum. In 1971 DPW policy was modified, and it has remained the same since then. DPW does not have a definition of "educational facility." Administrative policy says that a facility is to be considered as providing child care and thus subject to licensing if any one of the following applies:

1. Children are in the program for more than four hours a day.
2. A regular meal, breakfast, lunch, or supper is served.
3. Children under the age of three are cared for.

Texas Education Policy

TEA has no legal authority over private nursery schools and private kindergartens. The Agency administers a voluntary accreditation process, by which private schools show that they meet minimum standards, but it is limited to schools with a minimum of six grades. TEA has this accreditation authority under Section 11.26 of the Texas Education which states that:

> "With the advice and assistance of the state commissioner of education, the State Board of Education shall ...
> (5) establish regulations for the accreditation of schools."

This section is applicable to both public and private schools.

TEA has established policies to be used in the administration of this law, including the six-grade requirement for accreditation because of a shortage of staff available to do accreditation.

DESCRIPTION OF THE ISSUE

The issue can be divided into three parts.

1. What is a "bona fide educational facility"?
2. Should such facilities be regulated by the State?
3. If there is to be regulation,
   a. Where should the responsibility be placed?
   b. What should the regulatory policy be?

WHAT OTHER STATES DO

The following information comes from Abstracts of State Day Care Licensing Requirements, Part 2: Day Care Centers, a publication of the Office of Child Development, Department of Health, Education, and Welfare. State requirements may have changed since the survey was done in 1971, and abstracts cannot always tell the whole story. For example, the section on Texas quotes the licensing law on the definition of a day care center but does not mention the determination that has been made to exclude "educational facilities." Also, it is possible that in some states where certain facilities are exempted from licensing, another agency, such as the education agency, may have some regulatory authority that was not mentioned in this document.

Two states do not have mandatory licensing of day care facilities.

Ten states exempt preschool programs operated as part of an established private school or system.

Two states exempt private kindergartens.

One state exempts private nursery schools.

Five states exempt both private nursery schools and private kindergartens. In one of these five, such facilities are inspected but not licensed by the licensing agency (Department of Health) and issued certificates of approval by the Department of Education.

One state exempts private nursery schools and pre-kindergartens that are voluntarily registered with the State Education Department.

One state exempts kindergartens and day care centers operated or approved by the Department of Education.

One state exempts "educational programs."

Twelve states exempt private programs that run for less than a specified period of time; ranging from three to five hours, generally four.

Ten states specifically include private nursery schools in the definition of facilities that require licensing.

Six states specifically include private nursery schools and private kindergartens in the definition of facilities that require licensing.

Fourteen states and the District of Columbia do not specifically include or exclude private preschool educational facilities in the definition of day care centers to be licensed, although the laws read as if all private group care facilities for preschool children _might_ be included.

What other states do may suggest some possibilities for Texas, but there are so many variations that no clearcut pattern emerges to suggest _the_ right way to deal with "educational facilities."

DISCUSSION OF THE ISSUE QUESTIONS

1. What is a "bona fide educational facility"

At the present time there is not a good definition of "bona fide educational facility" for preschool children.

TEA will accept application for accreditation from any institution that calls itself educational, and then various aspects of the facility are evaluated. There is actually no definition of a "school." There are certain accreditation standards for preschool and kindergarten programs concerning teacher qualifications, plan for the educational program, and class size. DPW policy says that a program of less than four hours that calls itself educational does not have to be licensed, providing there are no children under three in care and no meal is served.

TEA has to some extent, but DPW has not, attempted to get into the areas of curriculum or staff qualifications, which are important factors in the consideration of a facility's educational possibilities. This decision has probably been made for other reasons (such as staff availability and capabilities), but it does take into account the fact that there is great disagreement in the field of early childhood development about what should be included in a good program for young children. Such disagreement might make it very difficult for Texas to develop a workable definition of "bona fide educational facility." However, it would seem appropriate for such an effort to be made, probably by a group composed of representatives of the many viewpoints that exist. The definition and standards developed would vary in importance and use depending on the licensing strategy that is adopted.

There is an important point to be made. To say that the issue is "education" versus "day care" may be inaccurate and misleading. Everything in a child's life is part of his education, for good and for bad. What people in the field of early childhood development mean when they say "educational program" are the positive, enriching, helpful experiences which every child should have. It may be incorrect and unfair to state or imply that only an "educational facility" can provide such experiences while a "day care facility" can provide only physical care and supervision of a child while his parents are away. Both types of facilities can provide either educational experiences or physical care and supervision or both. The Attorney General's Opinion referred to earlier recognizes this fact and speaks of consideration of the primary function of a facility for licensing purposes.

2. Should educational facilities, however ultimately defined, be regulated by the State?

Pro

All children in "out-of-home" group care situations need the protection from physical and mental harm that an outside regulatory agency tries to provide. The length of the program or the program content does not affect this need.

Parents sometimes do not have the time or knowledge to assess facilities for their children, so the State should guarantee that all facilities, including educational facilities, have met certain basic requirements, thus making choices somewhat easier for parents.

Operators may not know the "right" things to do, and having to meet certain standards would help provide that knowledge. Also, the consultation that would come with regulation might be beneficial.

Con

By developing a set of standards that apply to all facilities equally, the State may be eliminating some innovative programs that have aspects in conflict with the standards.

Parents have the right and the responsibility to choose what they want for their children, and the State should not try to say what their children should have.

Licensing of all day care facilities is not yet complete, and money and effort should be directed at them first since they provide more child-hours of care than "educational facilities."

3. If there is to be regulation, where should the responsibility be placed and what should the regulatory policy be?

Alternatives

A. DPW could maintain the status quo, exempting from licensing educational facilities that serve children three years of age and older for less than four hours a day without a meal.

Pro

Resources would be concentrated on facilities that serve, overall, the most children for the longest periods of time, and there would be no increase in administrative cost.

Con

Many young children in "out-of-home" group situations would remain unprotected by any regulatory agency.

B. DPW could license all group care facilities for young children.

(1)(a) DPW could formulate and enforce one set of stansards that would apply to all facilities.

Pro

All children would be equally protected.

Con

Facilities could call themselves "educational" without having met any particular standards for the educational part of their program.

(b) DPW could formulate and enforce one set of standards for day care facilities and a separate set for educational facilities.

Pro

A facility that calls itself "educational" would have actually met certain educational requirements as well as basic day care standards.

Con

DPW might not have the expertise within the Department to formulate and enforce educational standards.

(2)(a) DPW could work with TEA to formulate standards for educational facilities, and then DPW would enforce them.

Pro

The Education Agency would have input into the regulation of educational facilities, but administration would not be complicated by being split between two agencies.

Con

DPW staff might not have the requisite training and background for evaluating performance under the standards developed by TEA.

(3) DPW could retain the authority to regulate educational facilities but contract with TEA for the formulation and enforcement of standards for these facilities.

Pro

DPW would be able to insure that all facilities meet certain basic requirements by specifiying in its contract with TEA that these requirements must be included in the standards developed by TEA. At the same time, TEA's expertise in the field of education would be well utilized.

Con

There might be uncertainty and confusion about which agency actually has what responsibilities for educational facilities.

C. TEA could formulate and enforce standards for educational facilities, and DPW could license all other facilities.

Pro

TEA could apply its knowledge of education to the regulation of educational facilities and provide consultation in that area.

Con

TEA might lack expertise in other aspects of group programs for children, such as health and safety.

D. TEA could regulate all group programs for young children.

Pro

TEA could provide consultation on educational programs and activities to all facilities caring for young children in an effort to upgrade them.

Con

This would be a massive change from the present arrangement and might not be well accepted. TEA does not currently have a mechanism and the staff for such an arrangement and setting up such an expansion would take a great deal of time, effort, and money.

ALTERNATIVES FOR REGULATING FAMILY DAY CARE HOMES IN TEXAS

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The attached are excerpts from a paper prepared by Gwen Morgan of the Day Care and Child Development Council of America, Inc. Anyone wishing to obtain a complete copy of the paper should so indicate when attending the Forum on Day Care Licensing.

Family Day Care in Texas

The evidence indicates that Texas' experience with family day care is very similar to that in other states. An enormous unmet need for day care, and a lack of public concern for the children of parents who are struggling to support their families, has resulted in large numbers of underground arrangements. Unable to find quality care available in centers or licensed homes, parents have turned to unregulated homes.

There are only 95,000 spaces in licensed centers or homes in Texas; yet 400,000 Texas children younger than six have mothers who work.*

The plight of poor people and their children in Texas is dramatic. Texas has more poverty than any other state,** and many of these poor are children. Over one-third of the 2.5 million poor Texans are children under 15 years. Of all the children under 15 years in Texas, nearly one-fourth are poor. Rather than unemployment, poverty in Texas often means underemployment, low wages, limited job opportunities, inadequate skills. Many of Texas' poor parents are working. Of the working mothers who are not poor, especially those with young children, most are working in order to rescue their families from poverty. Those who fail to make it in the struggle to survive go on Welfare. Texas has 119,817 children under the age of six on Aid to Families with Dependent Children.***

Texas families have been turning more and more to unregulated homes for a place to leave their children while they work as the number of working mothers has dramatically increased. A survey**** of unlicensed day care in Texas found that only 20% of the homes in the areas surveyed are licensed. Projections based on survey data indicate that of 131,085 children in day care in the state of Texas, 44,465, or 33% are in unlicensed centers or homes. Almost half of these children are in family day homes; and the number of unlicensed facilities is of course very much greater for homes than centers because of the small number of children per facility. In the metropolitan areas, these family day care homes accounted for 99% of the unlicensed families identified. Licensing workers knew of almost all the centers in the state, but were not able to locate more than a small fraction of the licensable homes.

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* "Meeting the Needs of Young Texans," in draft, January 1974, Texas Department of Community Affairs, Office of Early Childhood Development.

** Poverty in Texas, 1972, Texas Department of Community Affairs.

*** Early Childhood Development in Texas, 1972, Texas Department of Community Affairs, Office of Early Childhood Development.

**** A Survey of Unlicensed Day Care in Texas, April 23, 1973, State Department of Public Welfare, Planning and Coordination Division.

Unlicensed family homes were not discovered in Texas' wealthy neighborhoods. Most day care was fund in middle income areas. The survey seemed to bear out the impression that there is a shortage of free or subsidized care for low income mothers.

This survey used very conservative methodology, counting only families which could be identified by name and address. Since it relied on mail and telephone rather than personal contact, it is probable that there are many homes which were not located. One surveyer did accomplish extensive personal contact on her own initiative, and her results indicated greater numbers of unlicensed family day care homes, but not centers, than the rest of the surveyers were able to identify through mail and telephone. This fact leads to the suspicion that the numbers of family day homes in the state which are not licensed may be very much greater than the number located by the survey.

Since the number of unlicensed centers is small, it is clear that a reasonable commitment of new staff could license them all. However, to license these centers and the homes which were identified in the survey would require 138 new licensing workers, based on current work loads. And since the survey may have missed many homes, the state might need to commit more than 200 workers to the task.

Texas therefore faces the same administrative problem being faced in other states in regard to family day care. What should be its future directions in regard to this service which no state has yet successfully regulated? Texas is spending $600,000 for its licensing program. It has knowledgeable staff, and a concern for the quality of its family day care. An outstanding handbook is available from the licensing office for family day caregivers wishing to upgrade the quality of the care they offer. 1,230 homes, caring for 5,964 children, were licensed in September of 1970. Yet in spite of these very real accomplishments, the state is not reaching or protecting in any way the large numbers of young children who are being cared for in homes other than their own.

What is Happening Elsewhere

The past several years have seen a great deal of self-analysis in state and local licensing offices. States are examining their family day care licensing, and questioning whether they may have missed opportunities for needed protection on the one hand, while creating needlessly formidable barriers to operators on the other. Similar self-examination is going on in other countries. In England, a recent study of illegal child minding has linked its effects to poor school performance, unemployment, delinquency, and poverty* A review of this research suggests that a less stringent regulatory method might have identified the caregivers so that help could have been provided them.**

In this country, it is estimated that fewer than 5% of the homes caring for children have been licensed.*** However, there are exceptions, particularly in rural areas. Vermont's Office of Child Development estimates that there are 400 homes to be licensed and that 300 of them are known and can be licensed.**** But most non-rural states do not believe they are reaching many of their family day care homes, and few believe that they could license all of them without a major and unlikely increase in staff.

Some ten states which are licensing homes have defined family day care in such a way that many homes do not have to be licensed.***** In New Jersey, for example, licensure begins only when the home takes in as many as five children. The care of four or fewer children is left unregulated. Narrowing definitions in this way makes the task of the licensing office more manageable, but leaves many children unprotected.

A few states have made a heavy and enthusiastic commitment in limited geographic areas to improving family day care through the use of licensing staff. In New York City, for example, in a large demonstration day care system, licensing staff were diverted and built into the service system

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* Brain Jackson, "The childminders," New Society, Nov. 29, 1973.

** "Who Will Mind the Minders," Lancet, December 29, 1973.

*** Mary Dublin Keyserling, Windows on Day Care, National Council of Jewish Women, 1972. See also Westinghouse Learning Corporation and Westat study cited above.

****Rolland Gerhart, Vermont Office of Child Development.

*****Edna Hughes, Office of Child Development in a consultant and supervisory role. They became support staff for the homes in the demonstration program, but offering no regulatory service to the children in the many unlicensed homes in the city. California in some counties has funded very large staffs to provide support services to family day care homes. Wisconsin and a few other states have been following the same road. These states, as in New York City, perceived an unmet need for support services, without which quality could not be achieved, and took on the role. One might question whther this need should best be met through the staff of the regulatory agency, or whether it might be more appropriate to build it into the program development and service providing agencies, or contract for it as part of the per child cost of a family day care service system, as is being done in Massachusetts.

In those few states making a major commitment to a support system for family day care through licensing, the staff can visit only a few homes, often as few as 15. One research who had surveyed the literature concluded that no more than 25 homes can be covered by a licensing worker in family day care. However, his figures were skewed by the type of licensing in which the staff becomes a part of the service system. Most state licensing workers in family day care have heavier work loads than 25.

In eight states in the southeast in 1971, there were only 1600 licensed family day care homes, and an estimated 360,000 children under six cared for in homes other than their own.* Georgia, for example, has a family day care licensing law, but has never budgeted staff to implement it. Few complaints are being made by parents about the lack of protection.

Texas, on the other hand, is receiving child abuse complaints against family day care mothers, an indication of the effectiveness of the recent media coverage and public interest in improved child protection in the state.

In Massachusetts, little family day care was licensed before 1972, due to a handicapping overlap in legal responsibility. Including family day care among services to be regulated brought with it the automatic application of fire and safety regulations; authorized, not under the day care licensing statute, but under a state public safety statute. The safety department applied school house regulations to family day care homes along with centers, with the result that no homes could meet the requirements and thus none could be licensed. This problem has been legally corrected, but to date only a few hundred homes have been licensed.

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*"Problems of Licensing Family Day Care Homes," Southeastern Day Care Bulletin Number 4.

A survey made of parents in Massachusetts revealed that 62,000 children under the age of six are regularly cared for in homes other than their own, exclusive of play groups* Not all these children are in homes which need licensing, since some are in relatives' homes, and the survey did not separate the licensable from what was not licensable.

With the correction of the legal obstacle, the new Massachusetts Office for Children is now authorized to adopt feasible building safety requirements as well as licensing requirements, and enforce both through its licensing staff. If only half the children in homes other than their own are in licensable facilities, the the state will need to license at least an estimated 10,000 homes, a conservative estimate. To do a perfunctory job of licensing, the state would need 60 new workers; to do a barely adequate job, with a few interim supervisory visits a year to assure continuing compliance, would require 112. To do a good job would require several hundred workers. The General Court has approved funds for the agency for the employment of only five workers.

In addition to the large numbers of licensed homes, there is also a large turnover in family day care homes, unlike other licensed services. For example, in Pinellas County, Florida, in two months, out of 435 homes, 69 new homes were added and 31 lost. It is more usual in licensing to expect that a person seeking a license will continue to use it, since both the licensee and the state have invested heavily in it.

A study in Michigan of licensed day care homes revealed** that neither parents nor providers found any value in ongoing state supervision of their homes, viewing such visits simply as an unwelcome intrusion. The study concluded that more education of the public and of providers is needed to help family day care mothers understand their key role in the country's child nurturing. The study questioned whether traditional licensing is the best way to reach this goal, suggesting trial of a system of registration instead, supplemented by education of the public.

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* Richard Rowe, Child Care in Massachusetts: the Public Responsibility, Massachusetts Advisory Council on Education, February 1972, pp. 3-24 and 3-29.

** Gerald Hicks, in Licensing Power, Zion Illinois, February 1971.

The large numbers of units to be licensed in family day care requires large numbers of staff to carry out traditional licensing, and this fact raises many questions. Given the needs of children, is this the most useful way to deploy 60 or 80 or 100 new staff people? Both the Southeast study and the Michigan studies described above suggest that development of a cumbersome bureaucratic licensing operation is a circuitous route to protect children whose parents appear to accept responsibility for placement of their own children without state safeguard.

Characteristics of Traditional Child Care Licensing

Licensing can take many forms. In the field of child care, the elements which have become traditional in the licensing system include the following, some of which are common to all licensing, and some of which are characteristics of this particular type of licensing as it has developed historically.

First, there is a statute which is a legislative prohibition of the service. The Legislature delegates to an agency the responsibility of promulgating requirements, which are the conditions under which the state will allow the service to exist. The agency then applies the requirements, through a process which characteristically includes: an expectation that the potential operator must take significant time and effort to "tool up" to develop needed competencies and safety precautions; a large amount of paper documentation that the licensing requirements, and also the requirements of other regulatory agencies such as zoning, fire and building safety, and health, have been met prior to the granting of the license; a routine state inspection made prior to granting the license, with as many follow-up visits as necessary to see that each requirement has been met; ongoing supervision to assure continued compliance with the requirements; annual renewal.

If Texas is considering revisions in its statute and its standards, it should weigh the pros and cons of continuing to license family day care in the traditional way, as compared with other alternatives.

Some of the arguments given against traditional licensing as now administered

In discussions among state licensing officials, licensing experts, and researchers of family day care, a number of arguments have been made that the traditional method of licensing family day care, which has been successful in coverage of day care centers, may not be feasible for licensing homes. These arguments include:

- The large number of family day care units requires large numbers of staff, leading to high dollar costs. This need for staff is further increased by the high turnover of family day care homes.
- Because of insufficient licensing staff, and a lack of public demand for this safeguarding, large numbers of family day care homes operate illegally.
- Routine visits to all homes may not be the best use of professional staff time. The method diminishes the amount of staff time available to work with "problem" homes.
- Few parents or providers at present seem to see a need for licensing protection, viewing licensing as a unwelcome intrusion where it exists, as in the Michigan study, and accepting responsibility without complaint where it does not, as in Georgia.
- Licensing of some, rather than all, family day care homes is contrary to law, discriminatory, and a poor public service.
- Providing licensure first to families where Federal money is used to purchase care has the effect of withholding licensing services from homes used only by parents who pay for day care out of their own earnings. This is the large group of families most in need of licensing protection, since federally funded homes can be regulated through fiscal requirements. Licensing only the federally funded homes is also viewed by the poor as one more example of unfair state interference in the lives of the poor, which is not applies equally to others. This argument was made in Massachusetts by Welfare mothers

who did not find very compelling the counter argument that the state was offering them a priority service and an extra protection.

- Heavy-handed imposition of even scattered family day care licensing upon a public which may not perceive a need for it may erode public support for center licensing. Failure to license 90-95% of family day care homes, in states which cannot even forsee a time when they will be able to achieve full coverage, is unfair to the homes which are licensed, and may arouse public hostility, thus undermining all licensing.
- Licensing authorities staffed for no more than one visit a year cannot provide that guarantee against harmful conditions which the child welfare field has come to associate with the word, "license." Staff must be available to visit each home at least several times a year if an assurance of protection is to be made. Otherwise, the license could lead parents and community to relax their individual vigilance, their natural sense of responsibility undermined by a false sense of security. Without staff, licensure may be a dishonest guarantee of quality.
- Over-formal regulation, however well done, may destroy the genuineness of family life shared with children in homes other than their own, and might create home-like institutions rather than real shared homes. It could also undermine the still commonly accepted value that children are the responsibility of their parents. Technical, time-consuming licensing may not only be inappropriate, but it may also be counter-productive in this regard.
- When a service is defined as something to be licensed by the state, this definition often brings with it additional regulation imposed by regulatory agencies other than the licensing agency, deriving their authority from other statutes, and acting independently from the licensing agency. Chief among these other forms of regulation which may be applied to family day care are: zoning, deriving its authority from locally passed zoning by-laws under state enabling legislation; safety regulation, deriving its authority from state safety statutes,

and state permission for local requirements, both locally enforced; health and sanitation requirements, deriving from public health statutes at the state level, sometimes with additional local requirements, and often enforced by several different local health officials; and in some places local licensing in addition to the state. The effect of all this regulation, and the application of requirements which were developed for other services more institutional in nature and often inappropriate for family day care, is to overwhelm the home with safeguards not required of other family households, treating it as a small institution rather than a home. This additional regulation may be a major factor driving family day care underground. Few homes come forward to meet so many incompatible demands from such a formidable array of inspectors.

The Legal Inappropriateness of Family Day Care Licensing When Traditionally Administered

Family day care licensing does not entirely fit the basic reasons for licensing.* There have been two historic changes which have led to the need for licensing. One is the change to a society which is technically specialized, in which the ordinary citizens have neither the expertise nor the access to inspect for quality and safety, and must rely on the authority of the state for protection. The second is the change to a society in which people have become more mobile, more likely to be strangers to one another, with the result that community supervision cannot be fully relied upon in many locations. Family day care may not fully fit these rationales. It is not so technical that the community cannot understand it and judge its quality. Parents have considerable opportunity to observe their children's care and to make requirements of the day care providers, at least in some geographic areas. There are still communities which exhibit responsibility for the well-being of the children in their midst.

Licensing as a preventive, future-oriented service, is more appropriate to a stable and technical service, in which the operator makes a time-consuming and often expensive investment in a license to operate, holding and using the license for a long time. The informal, non-technical, and sometimes short-term nature of home care may be less appropriate for this type of regulation.

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* Norris Class, Safeguarding Day Care Through Regulatory Administration, paper presented at NAEYC meeting, Seattle, November 1973.

Alternatives for Texas

In the light of the arguments which are being made against licensing as the method of choice for regulating family day care, the citizens of Texas will want to examine the alternatives, weighing these and other arguments for and against various directions the state might take. The alternatives to be examined in this paper are:

1. Continue the status quo
2. Redefine family day care, so that homes caring for less than three children, or children from only one family, are exempt
3. Improve the licensing administration. License "systems."
4. Completely abolish licensing.
5. Register the family day care homes.
6. Some combination.

The First Alternative: Continue the Status Quo

This alternative would continue the legal mandate to license all homes, but, as at present, most homes would be unlicensed. All the arguments against traditional licensing, cited above, are in reality arguments against this option. Its only advantage is that it continues a course of action somewhat familiar to some members of the public, so that it at the same time retains what public support exists for licensing family day care and avoids confusing the public with another regulatory method. Those who argue in favor of continuing on the same course of action believe that the existence of licensing requirements, and the possibility that some day they may be enforced, will act as a tool to educate the public so that, in the long run, quality will improve. The counter argument is that failure to enforce a law leads to lack of respect for the law, and undermines the possibility that the situation will improve.

The Second Alternative: Redefine Family Day Care

This alternative redefines the service to be licensed in such a way that homes caring for less than three children are exempt from licensing. There are other variations on this alternative which might be considered: exempting homes which care for children above the age of six, or some other age; exempting homes which care for children who are all related to one another; exempting homes which care for children from less than three unrelated families. The purpose is the same in each case: to reduce by definition the number of licensable units, so that the state is better able to cope with the task of licensing the remainder.

This alternative would answer some, but not all the arguments given against the present effort at licensing. The state would undoubtedly achieve better coverage of the homes it is mandated to license.

However, many children would be left unprotected in unregulated situations. A rational argument for the exemption is difficult to make, since one or two children are probably as much at risk, or more, in family day care, as are three to six children.

A variation on this suggestion would be to exempt small numbers of children from licensing, but require them to be regulated through registration. This would have the advantage of state protection to all children in family day care. However, using two methods might be confusing to the public, and would cause difficulties as the status of the homes shifts because of changing numbers of children in care. It is difficult to think of a rationale for using one method to protect two children, and another method to protect three children.

Virginia's statute for licensing, amended in 1972 departs from the usual. Family day care is defined as "more than three children," leaving large numbers of children outside the definition and therefore in unregulated homes. However, the Act provides that "in case of a complaint in such a home where less than four children reside, the Commissioner may cause an investigation to be made ad provided in 63.1-198 and may require such home to comply with the provisions of this chapter applicable to family day care homes if he finds that such home is not conducive to the welfare of the children received therein."

Most family day care homes care for less than three children, so that exempting this number of children from licensing would certainly bring the licensing program to a more manageable number of units. If one assumes that a family day caregiver with only one or two children in care is under less heavy pressure, has more time to give to the smaller number of children, and generally offers a situation likely to be safe and healthy because of the small number, then this alternative makes sense. However, the counter argument is that children alone and at the mercy of an inadequate caregiver, without even the support of a group of peers, are a greater risk than a larger group.

The Third Alternative: Improve the Licensing Administration

Texas may decide to continue to try to license family day care homes. This alternative assumes that this decision must include realistic planning and commitment of resources to the effort, rather than the present wistful, mythical approach going on in most states. It is important to begin to be honest about family day care licensing.

There are three actions which states can take which will alleviate some of the present problems: (1) License "family day care systems", (2) develop a system for helping the operator through the maze of different types of regulation, making sure the requirements and procedures are appropriate to homes; and (3) develop requirements for group homes.

First, states can amend their licensing statutes to provide for the licensing of "family day care systems" Massachusetts has wording defining a system as: "'Family day care system,' any person who, through contractual arrangement, provides to family day care homes which it has approved as members of said system, central administrative functions including, but not limited to, training of operators of family day care homes; technical assistance and consultation to operators of family day care homes; inspection, supervision monitoring, and evaluation of family day care homes; referral of children to available family day care homes; and referral of children to available health and social services; provided, however, that family day care system shall not mean a placement agency or a day care center."

Homes which are part of a satellite system administered centrally, often with a group day care center as a training center and visible focal point, do not need to be licensed independently. In fact, if the administration and fiscal accountability is centralized, it could be questioned whether the individual homes have the autonomy to be licensed separately. Instead, the system can be licensed as a single entity, its administration held accountable for seeing that member homes meet basic requirements.

Homes, as sub-parts of a licensed system, would be approved by the system on the basis of state requirements. The system itself would also have to meet additional requirements which the state would place on systems, covering the number and qualifications of support staff, ratio of central staff to member homes, services to the homes, total size of system. If a system or one of its homes does not meet requirements, its license can be removed, and penalities invoked against the system. It is likely that in such a case, the home would be dropped from membership by the system, and the state would then move against the home for operating illegally.

Licensing systems has the advantage of reducing the number of units to be licensed by the state, passing along some of the work of supervision to the service system. This concept is congruent with the concept of a family day care system as a "dispersed center."*

An advantage of licensing family day care systems is that this definition of a type of service offers a way for the family day care home to be defined as not-for-profit, so that it can participate in food programs for which the children may be eligible.

The Massachusetts Office for Children is now developing requirements for systems. Since at best, systems will probably combine a center with homes, licensing of systems should bring with it some reorganization of licensing staff to achieve integration of the staff who license centers with those who license homes.

Those who argue against the licensing of family day care systems object to passing on the task of inspecting and approving the homes to the central system staff. They argue that this does not reduce costs, but simply places those costs in another place outside the licensing office. Some have believed that this is a delegation of the licensing authority to a private agency, but this is not the case. Licensing cannot be done by a private agency. Licensing systems is legally comparable to the licensing of a child placement agancy which then approves its member foster homes. If the state regulates the central agency well, with appropriate requirements, and assures itself through inspection that the home requirements are being maintained, this idea has distinct advantages. It is certainly better than leaving vast numbers of homes unregulated, and, where it exists, it appears to be improving the quality of family day care. It is not an overall solution, however, since it is unlikely that the state could require all homes to join systems. The independent family day care home which exists in such large numbers will still have to be dealt with in some way.

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* Carl Staley, Conference on Family Day Care, January 22-24, 1974, St. Petersburg, Florida, to be published by Southeast Regional Education Council.

A second action which states might take to improve the licensing of family day care is to examine other statutes and requirements to determine whether the number and kinds of codes applied and inspections made by different agencies are appropriate for the size and informal characteristics of homes. Each agency of government operates under its own authority derived from its statutory mandate. While there may be logic in requiring a variety of inspections for centers and group homes, regulation of family day care by agencies other than the licensing authority should not go beyond the type of requirements made of homes in which families live with their own children. The licensing agency should be charged with creating a workable system, and assisting operators in their dealings with other regulatory agencies.

Zoning has become in recent years a major obstacle to family day care, as well as to other community based services.* In some states it will be possible to define day care as a "customary home use" in the local zoning by-laws or in the state's enabling zoning statute, allowing family day care as a matter of right in all zones in which people live.

Two major problems for family day care regulation, nationally, have been fire and building safety codes which are over-rigid, and the difficulty of getting local inspectors to visit the homes. These two problems need to be looked at separately, although they are interconnected.

First, the code for safety of the family day care home needs to be the same as or very close to the community standards for the homes in which people live with their own children. Family day care takes place in homes, not in little institutions which are simulated homes. If the state does not find it necessary to place a particular restriction on a home in which a large family of children lives by day and sleeps by night, then that restriction is hard to justify for the home which is shared with a few children during the hours when adults are present and awake.

One of two approaches to a code might be taken. The first would be a state requirement that the home meet any local standards for general residential occupancy, with a provision of state standards for general residential occupancy in the absence of such local standards. The state should be clear that no other standards should be applied through building inspection, beyond what is required of homes. This would assure that the licensing authority could call on the help of local building inspectors, but would prevent over-rigid codes. It is likely that this would require statutory wording.

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*Guides for Day Care Licensing, U. S. Dept. of Health, Education & Welfare, Office of Child Development

If that approach is not feasible, a state safety code for family day care should be adopted, either by the state building safety authority or by the licensing authority, but not by both. At present, Texas law does not give the authority to the state Fire Marshall to impose a uniform statewide safety code for day care. If the state wishes to give such authority to the Fire Marshall, or to adopt safety requirements as part of the licensing codes, a model for such requirements may be found in the Life Safety Code for Day Care which has been adopted by the National Fire Protection Association as a recommended state code, and which includes standards for the safety of centers, group homes, and family day care.

The first of the above two approaches includes a local building inspection, according to local general residency codes; and the second, according to a statewide code for building safety for family day care. If it is politically feasible to write a state statute which inhibits local building inspectors from applying more rigid requirements at the local level, reasonable codes could be enforced which do not inhibit this needed service. If not, it might be more desirable to go in the direction which several other states have taken, and place the responsibility for building safety inspection in the licensing office. Trained safety experts could be part of each regional licensing office to back up the licensing staff, who would inspect the homes for safety as well as other factors. The state licensing agency would not require a local building inspection as part of the licensing progess, but would take responsibility for safety through its own staff.

Whichever of these approaches which is possible to implement would be an improvement over a system of licensing if inspections at the local level are causing long delays in the process, and applying over-rigid requirements. It should be emphasized that the above suggestions are intended to assure building safety, rather than to remove needed protection. Building safety is of the utmost importance for children in day care. What is needed is not less protection, byt more appropriate requirements and processes.

In the same way, state health codes, which are usually derived under the authority of health statutes, are many in number and usually inappropriate to family day care. Most states could benefit from commitment of staff time to write a single health code especially for day care centers and family day care. It is important in writing such a code to make decisions of each requirement, whether it should be the responsibility of the licensing authority or the health authority, to avoid duplication of inspections. Once written, such a code would be promulgated by the state health agency. Where possible, it would be desirable for the health department and the licensing department to make an agreement for the licensing staff to do the inspecting of homes on behalf of the health agency to determine compliance with the health code for day care; ideally this code would be printed with the licensing requirements for family day care. Licensing staff should be able to call upon the expertise of various specialists in the health agency for pruposes of consultation to the homes in alternative ways of meeting the requirements of the health code.

A third action which states can take to increase their coverage in licensing family day care homes would be to develop definitions and an appropriate set of requirements for group homes. Group homes are usually defined as the care of between seven and twelve children in a residential setting. A group home is not the informal sharing of a home; it is more like a small, informal center. To accomodate as many as twelve children, more than one staff person is needed. It is reasonable to require minor structural renovations to assure safety of the group, beyond what might be required of a residential dwelling. Health and safety requirements should be suitably tailored to the needs of a very small service, and a set of requirements appropriate to group homes is also needed by the licensing agency.

Attention to regulation of group homes is relevant to improving the coverage of licensure of family day care, since a woman who wants to provide a small child-caring service knows that even if she is licensed for family day care she will be operating illegally if she takes in more than the state's limitations on number of children, usually six. If she knows that beyond that point she must meet all the formal requirements developed for centers, she faces a complex of very expensive modifications to her house or apartment. Knowing this, if she anticipates including more children in the future, she may prefer to offer her family day care illegally rather than becoming licensed. Requirements for group homes which are reasonable and appropriate to the type of service might bring some underground family day care to light as well as the group homes.

The more services a state can provide to licensed homes, the more incentives there will be for providers to submit to licensure. However, licensing is so costly to the state in staff that many states find it unlikely that they will be able to provide both licensing staff and funds for services.

For a state willing to make a commitment of heavy staff investment in family day care licensing, this alternative of improving licensing has advantages. Licensing is familiar to the public, even though family day care licensing is not well known. When licensing has the full support of the public and its elected and appointed officials, and the understanding of the courts, it offers a great deal of protection to children, placing the initiative upon the family day caregiver to prove in advance of operation that no harm is likely to be done. If the state suspects the possibility of harmful conditions, it can move swiftly to intervene, rather than waiting to punish a crime.

On the other hand, without staff in large numbers, and well-trained staff, none of these advantages will prevent the flourishing of an extensive underground network of family day care. Some of this unlicensed care may be of high quality, and some may be extremely hazardous to children. Either way, the state is in a dishonest position if it requires licensure which it cannot enforce.

The method is costly in money and staff. State funds which might otherwise have been used in services to entice more homes to be known to the state, are heavily committed to routine gathering or records and approvals about the few which are already known.

The Fourth Alternative for Texas: Abolish Licensing Altogether

One way to deal with family day care licensing might be to abandon the effort entirely, and place major emphasis on other ways of achieving improvement in quality. This suggestion may appear dramatic and drastic, but, upon analysis, it is not far from what some states are now doing in actual practice.

Some states which have statutory authority to license family day care are dealing almost entirely with homes which are publicly funded through their Welfare Departments. Even if they did not license, these Departments would still be obligated to monitor quality to be sure that federal funding requirements are met. Even if there were no licensing mandate at all, such states would still be regulating the same homes through fiscal administration, without promising a preventive protective service to all children which they are not delivering. For such states, putting staff energy into the task of enforcing fiscal requirements for publicly funded children, without confusing that task with the task of licensing, would be more realistic and more logical. State fiscal standards could be adopted, improving on the Federal Interagency Requirements of 1968.

Compared with other states, Texas has been clear on the distinction between purchase of service and licensing, and there has not been the above confusion in its licensing program for family day care. However, the state might want to examine this alternative.

To choose this alternative is to make a decision not to rely on licensing. Instead, the state would put its energies into good enforcement of funding requirements so that service of reliable quality is achieved whenever the state spends money on children. Many poor children would receive the benefit of the state efforts; many working poor and middle class families would not.

Gross abuse and neglect would be protected against through improved child protective legislation and enforcement, and public education to encourage more reporting of potentially harmful conditions. Texas appears to have made a start in this direction.

Finally, the state would concentrate on what can be done in a non-regulatory way to upgrade and assist the existing family day care network. An assumption is that funds which might have gone into licensing can go instead into public services to the family day care providers and parents, including education of the public as to the need for quality in the care of children.

Some of the services which the state might find feasible to offer to the family day care network might include any or all of the following:

- Health examinations for children in family day care
- Loan of books, toys, and equipment
- Funds for subsidy to renovate a home to make it safer and more useable for children's play
- Group insurance
- Referral of parents to caregivers and caregivers to parents
- Counseling upon request ot parents and caregivers
- Education and training, for both parents and caregivers
- Voluntary registration with referrals
- A Directory
- A newsletter
- Referral of parents or caregivers to community services, such as health, social service, recreation, employment and training, protective, and other
- Substitute arrangements for emergency situations or for training opportunities
- A central meeting place where parents and caregivers could go for information on child care activities, offering the opportunity to meet others in the field of day care, both family day care and nursery center staff.

This alternative has the advantage of honesty; it does not falsely guarantee quality which it cannot produce. It is direct in its use of funds to upgrade quality, rather than indirect in requiring quality of homes which are not receiving enough income to meet standards.

An underlying assumption of this alternative is that parents do not need or want state intervention in family day care beyond the enforcement of improved legislation for the protection of children from neglect or abuse. If this assumption is not correct, then the state will not be offering protection which parents want to rely on. Attitudes of parents are central to a decision about this alternative.

A Fifth Alternative: Registration of Family Day Care Homes

Registration was suggested six years ago in a Children's Bureau publication on licensing,[*] and since that time a number of alternative models of registration have been proposed.[**] States considering registration are concerned that family day care be regulated, but are seeking a method which is gentler and has the potential of reaching more homes than traditional licensing.

No state has field tested a model of registration and yet, and few have made statutory changes. There is no model statute for registration, although several drafts are being prepared.

North Carolina's statute, passed in 1971, was the first to mention registration, the purpose of which is described in the Act as follows:

> "So that day-care plans which are not subject to licensing may be identified, so that there can be an accurate census of the number of children placed in day-care resources, and so that providers of day care who do not receive the educational and consultation services related to licensing may receive educational materials or consultation through the Board."

Michigan recently passed a statute, Act No. 116 of the Public Acts of 1973, permitting the Department of Social Services to field test a model or models of registration in up to three counties in a two year demonstration project. Registration as defined in the Act "means the process whereby the department maintains a record of all family day care homes, promulgates rules under section 2 of this act, and requires the person operating a family day care home to certify that he has complied with the rules."

In the absence of solid experience with registration, a variety of hypothetical models have been developed. The basic components of all registration models, translated into operational detail, are the following:[***]

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[*] Norris E. Class, Licensing of Child Care Facilities by State Welfare Departments, 1968, U.S. Department of Health, Education and Welfare, 1968, U.S. Department of Health, Education and Welfare, Children's Bureau Publication No. 462.

[**] Norris E. Class, "The Public Regulation of Family Day Care: An Innovative Proposal," April 1972 mimeo.

[***] Edna Hughes, "Registration/Requirements Declaration/Graduated Training/ Protective Services, (A Model for Family Day Care Regulation)", October 29, [illegible] mimeo.

A registry office is established at the county or district level, which maintains three records: (1) a registration book with the name and registration number of each applicant registrant, (2) a master file registration contkol card, 6x8" with the immediately accessible information whether the home is pending, active, or closed, plus face sheet and decision type of data, and (3) compiled statistics from the cards giving the total numbers of day care homes, by geographic area, and including capacities, numbers of children and families.

The same information on procedures would be used with both the family day caregivers and the parents. This would include instructions about where and how to register; and information to fill out which would be posted on the registration card. The file card, the procedural form, and any educational materials would be developed by agency staff and the public, using the committee method.

The staff maintaining the registry would be well-trained and qualified clerical staff, supervised by a professional staff member. Experimentation is needed to determine the best agency in which to locate the registrars, the feasible geographic area to be covered by each registrar, and the number of registrars who can be supervised by one professional staff person.

Potential providers would go to a central place to register the fact of their providing family day care, and to report the numbers of children they are caring for. The office visit would be a means of communication between the state regulatory agency and the service provider, offer a means for knowledge of the person, and education of the community, -- important elements in a state regulatory system.

There would be no insistence on fire and health clearances from other agencies. In some variations of this form of regulation, the provider certifies that the home meets certain standards which the licensing agency is authorized to establish; in other variations, there are not such standards. In either case, the licensing agency does not attempt to enforce health and safety inspections by another agency.

Various conceptuals models of registration have been proposed by various writers.* These different variations can be roughly divided into three different models, with variations within each model.

Registration Model A. Registration with Requirements**

In this model, states would register all family day care homes, and would promulgate requirements, but would make it clear to the public that no routine inspections are being done prior to registration. Regulatory staff would not visit the homes unless there were a complaint or a request for help. A variation of this model would allow staff to do random sample checking of some homes. Another variation has home visitors who try, over time, to call on all registered homes.

In general, this model is a form of licensure, since requirements are promulgated, and the state may examine records, enter homes, inspect, and invoke penalities when requirements are not met. A variation, called a directing model, will be described below. The major difference between registration with requirements and licensing as traditionally administered is the fact that the state enlists the help of parents and the community, through wide distribution of the requirements in simple form, rather than inspecting prior to operation and collecting documentation on the provider.

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* Norris Class, op. cit.

Edna Hughes, op. cit.

Gerald Hicks, op. cit.

Bernard Stumbras, Wisconsin Department Health and Social Services, personal letter.

Patricia Bourne, Elliott Medrich, Louis Steadwell and Donald Barr, Day Care Nightmare, Berkeley: University of California, Institute of Urban and Regional Development, February 1971.

Joe Gallant, Massachusetts Department of Public Welfare, memorandum 1971.

Edith Ruina, Massachusetts Early Education Project, memorandum 1971.

Gwen Morgan, Regulation of Early Childhood Programs, December, 1971, Battelle Memorial Institute.

** Edna Hughes, op. cit.

Upon receiving a potential provider's statement that the home meets the requirements, states would issue a "certificate of registration," a formal statement that the home is registered with the state and that the provider has certified that the home meets state requirements. This certificate is in fact a form of license to operate. It is called by another name in order to avoid evoking images of traditional licensure in which the public could be assured that inspections have been done and some guarantee of quality made by the state, as in the familiar type of licensure applied to day care centers.

Unless the state is very clear in its intention and educates the community to the differences between this form of registration and licensing in the traditional sense, this model could lead to some confusion, since it has elements in common with licensing traditional to centers. Confusion would be especially great should a state which has been making a major effort to license family day care by traditional methods decide to adopt this different regulatory model.

Because it is a form of licensure, this form of registration could probably be tested without a statutory change in many states, if the wish is to experiment without tinkering with the laws. However, a clearly worded statute would help to prevent confusion.

A number of variations, or levels, of this model are possible, depending on the resources which a state is able to commit. States might begin with a simple and relatively inexpensive model, and work toward adding more staff and support to the system at a later stage.

The basic elements of all registration, as described above, include a visit by a provider to a registry office to certify that her home is caring for children, that she believes the home meets state standards, and is willing to be inspected. Records would be kept in a registry. The caregiver would be given the requirements themselves, - no more than 10 or 15 simply stated requirements which can be checked yes, no, or partially met, scored by the applicant on the basis of assigned weights, and reported to the registrar. The provider would be required to give a copy of the requirements and the procedures to the parent.

An unresolved issue for further study is the question of whether the registrant should be required to give a copy of the completed form to the parent, or only a copy of the requirements themselves. It might be effective to encourage, but not require, the provider to go over the check list with the parent upon enrolling each new child. Regardless of how this is handled, it is an important part of this model to enlist the parents in their natural role of prime monitor and negotiator of quality of the care of their children.

Parents would receive an attractively printed, and brief, booklet describing registration. In it would be the requirements themselves, the information that the state believes that these basic requirements are needed for the adequate care of any child in family day care, that the home where their child is cared for is striving to meet these basic requirements. If parents have any question about any of the requirements and whether they are being met in a particular home, they should talk the question over with the family day caregiver to see if together they can find a way to meet the requirement. The registry office is ready to provide help and advice to both. At the end of the booklet there should be a brief statement about how to make a complaint on the basis of the registration requirements, and also whom to inform if there is a suspicion of neglect or abuse of children in a home. The booklet should also contain the information that family day caregivers are required to report cases of suspected child abuse or neglect in the families using their service. Other helpful information about payments, and the relationship between parent and caregiver could be included.

The parent in this model assumes considerable responsibility for the well being of her or his child in day care. Parents negotiate with the day caregiver on the basis of the requirements, observe the home, and have recourse to whatever community services there are. Staff of the regulatory agency stand behind the parents in cases where requirements are not being met. and protective enforcement assists parents in cases of suspected child abuse or neglect.

The state's responsibility is less than in traditional licensure. The state does not certify that the day care home meets requirements as it does when it licenses; it certifies only that the family day caregiver has stated that she believes her home meets requirements, and it makes sure that parents are informed about those requirements and of the parent role in negotiating with the provider on the basis of the requirements. The state makes no routine supervisory home visits. It does maintain records for information on the volume of family day care for planning and possible research. It does make lists of day care homes available, putting day caregivers and parents in touch with each other. Having identified the homes, if this model is successful, the state can provide information and services to them.

If and when the state has additional resources, another level could be added to improve the regulatory model. This would include an office interview for all applicants at the place or registration, by a professional, the maintenance of a mini-record, and greater use of the media for informing and providing education on child care, beamed both to the day caregiver and the parent.

Still another level of commitment of resources would add on group instruction, training, and meetings of day care mothers and parents, a newsletter, and some home visits for individual teaching or consultation. The model does not include routine visits for supervision, but at every level of design, the model includes the idea that staff would be available to visit homes upon a complaint or a request for help. At this third level, budget commitment assures that professional help is available everywhere in the state.

One licensing expert*has suggested a model very similar for all practical purposes to the above description of registration with requirements, but with a different legal basis. The assumption underlying his model is that licensing is not the appropriate regulatory method for family day care, because of the service's lack of social visibility, its informal and transitory nature, the large number of units which it is costly to inspect and the generalist, non-technical nature of the service. He has developed a model intended to be directing rather than licensing regulation.

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* Norris Class, op. cit.

Regulatory law has been classified into two basic legal categories, enabling regulation and directing regulation.* Enabling regulation, or licensing, is future oriented, requiring a would-be provider to make major effort to acquire competencies and safeguard against harm to children before being permitted to perate. Directing regulation assures state intervention to punish infraction of the law, but does not require assurance of protection prior to operation. An example of directing regulation is our child labor laws, which can punish employers who exploit child labor, but which do not require proof in advance that no child can be hired before a factory may be allowed to operate.

Under directing statutory language, the state may enforce requirements, but without the heavy preparatory and future-oriented emphasis of enabling language, which in day care licensing has traditionally required documentation of prior proof that requirements will be met before allowing the service to take place.

A model of registration was developed which was intended to be directing, rather than enabling type of regulation. However, one legal opinion has been stated that this model, too, is a form of licensure.** Since all operators are required to be registered, the registration constitutes a permission to operate, or a form of license. (See Appendix).

For this, as in all the alternatives, if attractive incentives to providers to make themselves known can be developed, the model has greater likelihood of achieving its goals.

A major advantage of this model is the fact that the state retains the functions of standard-setting and enforcement of standards, without costly investment in routine inspection prior to operation. Another key advantage is the central role played by parents. Some argue that this model offers superior protection over licensing, in involving parents and the community in the safeguarding process more heavily. Others argue that it offers less protection, since caregivers are unlikely to comply with requirements which are not imposed prior to operation.

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* Ernst Freund, Administrative Powers Over Persons and Property, Chicago, 1928, University of Chicago Press, Chapter 4, "The Choice Between Enabling and Directing Powers."

** Barry Mintzer, Deputy Counsel, Massachusetts Office for Children.

Registration Model B. Registration with Required Training*

This model of registration is closer to staff certification in some ways than it is to traditional licensing of facilities. It would require through statute that all family day care homes must be registered, and that a pre-condition of registration is the acceptance of at least 6 - 8 hours of training provided by the state, at no cost, to potential caregivers. Training would be designed to build the specific competencies needed by family day care providers, building upon work in progress in the field of training for child care professions.**

The registration provides vital statistics, as in other registration models. No requirements are promulgated or enforced, and no supervision is done. The state could refuse to register a home if the family day caregiver did not successfully complete the training program, so the method could act as a form of screening.

States would have to decide which agency appropriately should provide the training. To avoid resentment, it might be preferable if the training agency were a different agency than the one maintaining the registry. In that case, of course, the two agencies would have to work closely together.

This model relies on a required training program as a way of linking up the family day care providers with one another and with community sources of help. If training can develop competencies and deepen sensitivities to children, then this model has the potential for developing more sensitive providers. Certainly it has the potential ofseeing that providers operate in a relationship with a state agency or agencies which can provide continuing information and support.

As in all the alternatives, many services could be provided if the state has the resources and the commitment to provide them. Incentives might be especially important in this model, since the provider is expected to submit voluntarily not only to registration but also to training. For some, the training itself is an incentive, but for many, such training is not relevant to their needs as they perceive them.

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*Bernard Stumbras, Wisconsin Department of Health and Social Services, personal letter.

**Curriculum Modules for Child Care/Development Occupations, Project OEG - 0 - 71 - 4431 (357) Vocational Education Act, Atlanta Public Schools.

Child Development Associate Project, Office of Child Development.

Registration Model C. Simple Registration. [*]

This model would require that all family day care providers must register with the state. This required registration would provide the state with a record of all providers, with certain needed statistics. No supervision would be done of the homes, and no requirements would be promulgated or enforced. The emphasis would be on playing a helpful role in order to identify the providers by name and address, so as to send them educational materials. Standards could be included among the educational materials, but they would be model standards, rather than requirements.

Proponents of this model believe that there is considerable advantage simply in knowing where all the family day care homes are, and they are hopeful that the state can achieve full coverage by this method.

The model relies on non-regulatory services, and education of the public for upgrading the quality of the existing family day care network. The major purpose of the registration is to identify providers so that the state can provide services to them, as well as to gather data which might be useful in planning. Services which might be provided are listed above in the discussion of the fourth alternative, abolishing licensing.

Other alternatives.

After weighing the pros and cons of the various options listed above, and the internal variations within them, the state might consider combining some aspects of one with another. For examplie, it might be desirable to exempt some homes from licensure, but to register those homes. It might be desirable to license family day care systems and register independent homes.

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[*] Patricia Bourne, Elliott Medrich, Louis Steadwell, and Donald Barr, *Day Care Nightmare*, Berkeley: University of California, Institute of Urban and Regional Development, February 1971.

Incentives for regulation

There is a question whether the unlicensed family day care homes would in fact come forward to operate legally under a simpler, registration type of regulation. Certainly there is much more chance that they will become known to the state if some of the present major disincentives are removed. But the possibility remains that these homes would remain unregulated regardless of the method of regulation.

Whatever method of regulation is selected, attention must also be paid to developing incentives to get the homes registered or licensed. The state agency also has a responsibility to publicize vigorously the fact that registration or licensing is required.

Field investigation of what would constitute incentives for registration or licensing is also needed. Discussions with family day care mothers in Massachusetts* produced the recommendation that incentives need to relate to the actual needs which family day care providers perceive, in contrast to visits to confirm the fact that they meet standards, or uninvited educational consultation.

A few key points come through as family day care mothers expressed their own perception of their needs:

- an end to isolation. The support system can be as simple as knowing the other family day caregivers in town.
- status and importance for the role
- help with parents, in making expectations clear
- inexpensive liability insurance
- help in collecting the money if the state is subsidizing the care
- help in meeting the medical requirements.

In response to these needs, and to the general point of view that the very simple and basic needs must be met before more ambitious enrichment is attempted, a number of incentives could be developed.

(1) One incentive is the potential referral service which the registry would represent. Without going through bureaucratic red tape as in licensing, the provider could count on the fact of her service being

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*Linda McCauley, Massachusetts Office for Children, personal communication.

made known, without endorsement, to the potential users in the area.

(2) Another incentive would be state help in developing a group insurance plan.

(3) The state might remove the requirement of a pre-admission physical examination for children, and instead organize a health service to provide physical examinations to children who are in family day care. Present and future health insurance funds, plus parent fees might finance such a health program, along with some state funds to organize it. The state might go beyond trying to organize only a health examination and develop a full health program to children in family day care whose health needs are not being met elsewhere. A model of excellent health service could be developed for approximately $113 per child per year.* A state health program would eliminate one major deterrent to licensure or to registration, and at the same time offer a needed service to the child in the program. Families who are fearful of medical services hesitate to use licensed community facilities because of the required physical examination before admission. A change in policy would remove this obstacle to regulating the homes and would bring good health care to more families. A further important advantage is that it might stop the present over-reliance on pre-admission medical examinations as a way of identifying problems, when in fact physical examinations seldom identify problems.

(4) Another incentive is the added prestige which the official recognition from the state brings. The state agency could further develop this sense of prestige through its community education efforts, and through meetings and training.

(5) The state agency can use newsletters, meetings, and other techniques to reduce the sense of isolation which some family day care mother may feel, in certain communities where they do not have the support of neighbors or adult members of their own family. A chance to know other family day caregivers and to identify with the group engaged in this work will fill a need for some family day caregivers, and their satisfaction after identifying themselves may attract others to do

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*Ann DeHuff Peters, "The Delivery of Health and Social Services to Child and Family in a Daytime Program," in Early Childhood Development Programs and Services, Planning for Action, ed. Dennis McFadden, 1972, Battelle Institute, Columbus, Ohio.

likewise. Some contact with the day care center staffs and the academic community might also be developed.

(6) If family day caregivers are in contact with one another, they can begin to see themselves as a service network, and to share. In the August busy season, for example, special effort could be made at recruitment of users. Groups of family day caregivers could plan a single intake process after a group advertisement, such as, "We the registered (or licensed) family day care homes in Blanket County will be receiving applications for the care of children during the next two weeks. Please telephone Mrs. Soandso at ..."

(7) If the expenditure of public dollars is an incentive, the requirement that public funds only be spent in registered or licensed homes, enforced by the state, would be an incentive as well. However, the receipt of public funds will not be an incentive as long as children's services are under-funded by the state, and as long as a stigma is allowed to continue to be associated with the children who are eligible for funding. States must at least be sure that their rates are adequate before considering funds to be an incentive.

(8) A career ladder might be developed up from family day caregiving into the administrative service or regulatory agencies, or to day care centers.

(9) Some of the other incentives which the agency can develop might include any or all of the services listed above under the alternative of abolishing licensing altogether, page twenty-nine.

It is not necessary for the regulatory agency to think in terms of meeting this type of service need entirely from its own resources. Often it is more appropriate for such services to be provided through another agency or group. Planners should compare the overall costs and needs and make some overall judgments about how best to help the family day care network provide good care for children. Staff in the child care regulatory agency should work with a variety of other state agencies and community groups to develop a stronger support system for the family day care homes, as a way of enticing providers into the light of day.

Comparison of the Alternatives

The following is a comparison of the above alternatives for family day care regulation, analyzed for certain key variables:

COMPARISON OF ALTERNATIVES FOR REGULATING FAMILY DAY CARE HOMES IN TEXAS

Key variables	Status quo	Improve Licensing	Abolish Licensing	Model A. Registration w/requirements	Model B. Registration w/training	Model C. Registrati simple
What does the state guarantee?	Full enforcement prior to operation	Full enforcement, prior to operation	Nothing, except fiscal stds., c/p enforcement	State action against known violation	Orientation of all providers	State knowledge of all providers
What is the role of parents?	Protected by the state.	Protected by the state	Relies upon parental responsibility to choose & negotiate own services May inform parents of rights under fiscal stds., provisions of c/p laws	Prime responsibility, with back-up support by state	Prime responsibility, with state assisting by offering training to caregivers	Relies on parents' responsibi ity to cho & negotiat own servic may inform parents of rights unde fiscal stds provisions of c/p laws
Is there reliance on public education, beyond building public support for the regulatory method chosen?	No special reliance	No special reliance	Heavy reliance	Some reliance	Some reliance	Heavy reliance
Does the model depend conceptually for its success on the use of other forms of regulation?	Local health and safety inspection, in some places?	No	Relies on enforcement of c/p legislation and fiscal stds	Somewhat on c/p enforcement	No	Relies heavily on c/p enforc ment, and fiscal std

COMPARISON OF ALTERNATIVES FOR REGULATING FAMILY DAY CARE HOMES IN TEXAS

Key variables	Status quo	Improve Licensing	Abolish Licensing	Model A. Registration w/ requirements	Model B. Registration w/training	Model C. Registration Simple
Is a statutory change necessary?	No	Yes	Yes	No, but would make clearer	Yes	Yes
s there a record of the homes nnually updated and pub- ished?	Fails to achieve	Yes	No	Yes	Yes	Yes
Are there requirements?	Yes	Yes	No	Yes	No	No
Is state authority to visit homes part of the model?	Yes	Yes	No	Yes	No	No
Function of the visit?	Supervisory, consultation on request.	Supervisory, consultation on request	n/a	Consult, ltd. supervision	n/a	n/a
overage through visits?	total, but fails to achieve	Total	n/a	Limited	n/a	n/a
tate authority to move upon omplaint?	Yes	Yes	No, except child protective	Yes	No	No
re penalties invoked?	Yes, if operate w/out license or fail to comply	Yes, if operate w/out license or fail to comply	No	Yes, if violate requirements	Yes, if operate w/out registra.	Yes, if ope ate w/out registratio
there denial or revocation permission to operate?	Yes	Yes	No	Yes	Yes	No
s training an essential lement of the model?	No	Could be requirement	No	No	Yes	No
ow much staff is needed for uccessful regulation?	Fails to achieve	Large staff,- trained	No staff, relies on program, c/p staff	Different levels minimal to moderate	Minimal well-trained clerical, profess. supervision plus training	Minimal wel trained cle ical, professional supervision
ypothesized costs per home?	$200	$200	$118 in services	3 levels: $15, $47.50, or $97 Directing: $106	$39.50	$14.50, plus $118 in services
Reliance on services?	No	No	Yes	Some versions	No	Yes.

The Basis for Decision among the Alternatives

Several basic assumptions of the author underlie the above descriptions of alternatives, which should be put into words so that the reader may decide whether these assumptions are shared, before attempting to decide among the alternatives. These assumptions are:

- All children have the same developmental needs. They and their parents deserve the same protection by the state, whether their daytime care is in a family setting or a center. It is important not to develop a double standard tolerating poor and perhaps harmful care in homes while insisting on quality care in centers. Low quality family day care is not the quick and dirty answer to the nation's need for child care. Nor is it a cheap way of getting mothers off welfare.*

- Family day care is the sharing of a real home with a child or children. It is not the conversion of a home to a small child welfare institution which is "home-like." No form of regulation should be allowed to undermine the day care home as a home.

- All children in every type of care deserve to be treated equally. If a state is licensing only a small number of its family day care homes, it is failing to protect all its children equally.

- Government must deal fairly with people. If a state enforces licensing for some providers and leaves vast numbers of other providers unregulated, it is failing to treat fairly all persons who provide day care services in their homes.

- Parents have the right and the responsibility to share in safeguarding the daytime care of their children.

- The community, at the state and local level has an obligation, moral and legal, to safeguard its children who are in day time care or who need it. An important tool in preventing harm continues to be the use of the power of the state. Certainly society is weakened by punitive and authoritarian misuse of power, but just as certainly society depends upon its good policemen.

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*Most cost analyses [illegible] found that day care in homes and centers has roughly the same true costs, wh[illegible] needed support system's costs are included. For purposes of cost analysis, family day care can be thought of as a "dispersed center." phrase used by Carl Staley.

The kinds of questions which policy makers and the public should be asking about any of the above alternatives for family day care regulation in Texas, would include the following:

First and foremost, does the model serve the child? Is it adequate to achieve a level of quality in family day care sufficient to assure adequate nurture, and protect children in day care, and those who need day care, from physical danger and emotional and intellectual starvation?

Other questions to be asked in comparing the alternatives:

- Is the regulation acceptable to parents?
- Will the public support it?
- Is is constitutional? Is it legally appropriate for its goals?
- How much coverage of family day care homes can it achieve?
- Will providers accept it, and offer their services legally?
- What incentives can feasibly be built into the model to encourage greater participation by providers?
- Can it be enforced equitably for all family day care homes?
- Can it deliver on whatever guarantee it appears to make as the public understands it?
- If it relies heavily on other regulation, or on other types of service, or on community education, will those other actions be taken, and adequately financed?
- What is the state's child protective legislation? Is it adequate to protect children out of their own homes as well as in their homes.? What is the level of public knowledge of it?
- How much licensed and how much unlicensed family day care exists in the state?
- What is the reason for the growth in the number of family day care homes?
- Will this number continue to increase?
- How do family day care providers and parents perceive one another?
- What is the nature of family day care in different geographic areas of the state? To what degree is it offered by neighbors in neighborhoods where people know each other and share concerns and values? To what degree is it offered by neighbors or strangers who are unsupported by a community?

- What is the maximum work load which a licensing worker can carry, in numbers of family day care homes? What is the maximum work load which a licensing worker can carry and feel reasonably sure the quality of the care is known?
- What is the present work load?
- How much staff would be required to license all the licensable homes in the state?
- Can the regulatory agency realistically expect to assign this staff to family day care licensing in the next three years? ever?
- What would be the cost per unit?
- How much staff would be required to regulate all units using a selected alternative model?
- What would be the cost per unit and the total cost to regulate family day care by this alternative model?

Lastly there are two considerations which are not suggested as the basis for decision. The first of these is: will it save money? None of these models should be viewed as a way of cutting back budget commitments. So little money has been committed to family day care regulation in most places, and so little coverage achieved that it is clear that this is a service where more, not less, resources are clearly needed. The decisions must be made on what is the most feasible and most productive way to allocate those additional resources in the future. More of the same may be less productive than trying to use staff in new ways.

The second factor which should not be consdered a basis for decision is how much authority is used in the model? Many professionals in social welfare and early childhood education have a phychological bias against regulation, and tend to flee from enforcement into the more comfortable shelter of consultation. It is not the intention of the foregoing analysis to support that psychological need to evade the use of authority. Poor services do exist; children are at risk in some family day care homes; and the licensing agency and its staff do have a responsibility to prevent harm.

FEE CHARGING IN DAY CARE LICENSING

Prepared by Malcolm S. Host,
Neighborhood Centers-Day Care Association
in consultation with
the Department of Public Welfare

SITUATION PAPER RELATED TO FEE CHARGING IN DAY CARE LICENSING

Issue: Should a fee be charged for the licensing of a day care facility?

Background Information Related to Licensing: Licensing of day care facilities is by statute, the responsibility of the Texas Department of Public Welfare and has been since 1940. Licensing of child care facilities in the United States began as early as 1863.

In its early developments, licensing of child care facilities was not too demanding in terms of departmental time and attention. Today, it is taking on increasing significance for the following reasons:

1. Day care licensing activity has greatly expanded.
2. There is a shift in the kinds of applications licensing agencies are receiving. Initially, most of the applicants were voluntary and philanthropic in nature. Today, applicants who operate on a profit basis far out number the non-profit applicants.
3. Licensing staff require more specific skill and understanding of programs. Staff are called upon for intensive consultation during and after the initial licensing process.
4. Licensing has become interdisciplinary and involves relationships with other departments such as health, fire, safety, education and administration.

To effectively carry out these responsibilities, takes time and energy of the Texas Department of Public Welfare staff. This service costs money and must be dealt within the Department budget.

Philosophy of Licensing

A review of the basic philosophy behind day care licensing is necessary. This philosophy can be described as follows:

1. Day care licensing is a form of regulatory administration:

   The Texas Department of Public Welfare is given the authority by the Legislature to use quasi-legislative and quasi-judicial methods of dealing with organizations deemed to have a public purpose. This means the Department of Public Welfare has the responsibility for establishing standards for the service offered and has the right to issue or deny a license to operate the service based on an assessment of the organizations ability to meet those standards.

2. Day care licensing is concerned with facilities under private auspices:

   Historically, licensing has been concerned with the regulation of private enterprise in areas of service affecting public interests. The services of a private facility are available to the public or a certain segment of the public.

   The State has the authority to regulate private enterprise for the general welfare.

3. Licensing is only one means of securing conformity to standards and the upgrading of service:

   Other methods include:

   a. An accrediting system with voluntary registration.
   b. Standards for purchase of care higher than those outlined in the licensing regulations.

c. Approval for placement for each child rather than approval of the facility itself.

d. Required registration with rights of inspection.

4. Licensing is a preventive program:

Day care services should provide treatment, protection and/or prevention. Licensing should assure that the facility is so equipped and structured that children will receive appropriate care.

Fee Charging For The Licensing Process

A number of local and state regulatory groups charge a fee for licensing either individuals or programs who provide a specific service or activity to and for the general public. Fees are generally charged for the following reasons:

a. To partially defray the cost of licensing.

b. To control who will be eligible to provide the service.

A survey of fee charging in Texas produced the following information.

State Level-

Service	Fee	Reason for Fee
Architecture	$65.00 annual 15.00 renewal	Revenue
Plumbing	$1.00 to $30.00	Unknown
Pharmacy	$15.00	Revenue
Cosmotologists	$5.00 to $150.00	Revenue
Real Estate	$12.00	Unknown
Attorneys	$25.00 to $50.00	Revenue
Dentists	$30.00	Revenue
Engineers	$10.00	Revenue

Service	Fee	Reason for Fee
Nursing Homes, Maternity Homes	$25.00 a year $1.00 a bed	Revenue
Hospitals	$1.00 a bed	Revenue

Local Level

Many local communities charge licensing fees. Services licensed and fees charged vary by community. The purpose of the fee may be to produce revenue to offset licensing costs or to control who shall provide the service in that community.

Use of Fee Income

Fee income is usually included as income in the budget of the department collecting the fee, rather than being assigned to the general treasury.

National Fee Charging for Day Care Services

The Department of Health, Education and Welfare estimates that State fall into the following categories.

1. No fee--1/4 of all States.
2. Token fee of $1.00 to $2.00--1/2 of all States
3. Fee from $5.00 to $15.00 -- 1/4 of all States

Other States

The following States either charge no fees or it is unspecified: Alabama, Alaska, California, Delaware, D.C., Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, West Virginia and Wisconsin.

Fee Assessing States

- Arizona charges $25.00
- Arkansas has no fees from DPW, but $50 for the Department of Health for kitchen inspections.
- Colorado initial and renewal fees are: non-profit $1.00; profit - $5.00
- Connecticut - initial or renewal every two years: $25 and a provisional fee (6 months) $15.00
- Kansas - four or fewer children $2.00; five or more $5.00
- Kentucky - $35 initial fee and $15 renewal fee.
- Louisiana - local fees as high as $25 for fire inspection
- Maryland - unspecified local fees.
- Massachusettes - $15.00 with no charge for renewal
- Nebraska - $1.00
- New Jersey - $15.00
- Ohio - full day center with 30 children or more children is $100.00 and $50 for less than 30 children. Renewal fee is $25.
- Oregon - $25 per center
- South Carolina - $5.0
- Tennessee - $2.00
- Utah - unspecified local fees.

Summary of Background Data on Fee Charging

Fee charging varies from State to State and from Department to Department within the State. The usual procedure is to allocate income received from fee charging to the department collecting the fee to help defray the cost of licensing.

Arguments for Fee Charging

The following arguments for fee charging have been presented:

1. Financial support of the licensing process:

   The licensing process is becoming increasingly costly. As all individuals in the State do not benefit from the service offered, all citizens should not be taxed for this expense. Fees for licensing should be set to defray the total cost of licensing.

2. Reasonable fee to insure competency of licensing procedure:

   The cost of licensing should be the responsibility financially of both the State and the individual or organization being licensed. This partnership will place the person being licensed in the position of evaluating the services offered and to demand a quality of licensing staff performance.

3. Fee payment would remove day care from the definition of being a "welfare" service. This position has, as its basis, the assumption that most day care programs are a business and should not be tainted with a "welfare" stigma. Therefore, the service should be totally self-supporting, including the cost of the licensing process.

4. Fee charging would be a method of controlling who would provide day care services. Some people argue that many uncommitted and unqualified individuals enter the day care field. If a large licensing fee were charged, this would become a form of "deterrent" to those who are not seriously committed to providing this service.

5. As day care can produce a profit, programs should not be subsidized by the State. Proponents of this position argue that the licensing and consultative process provide free service to commerical ventures through the use of tax funds.

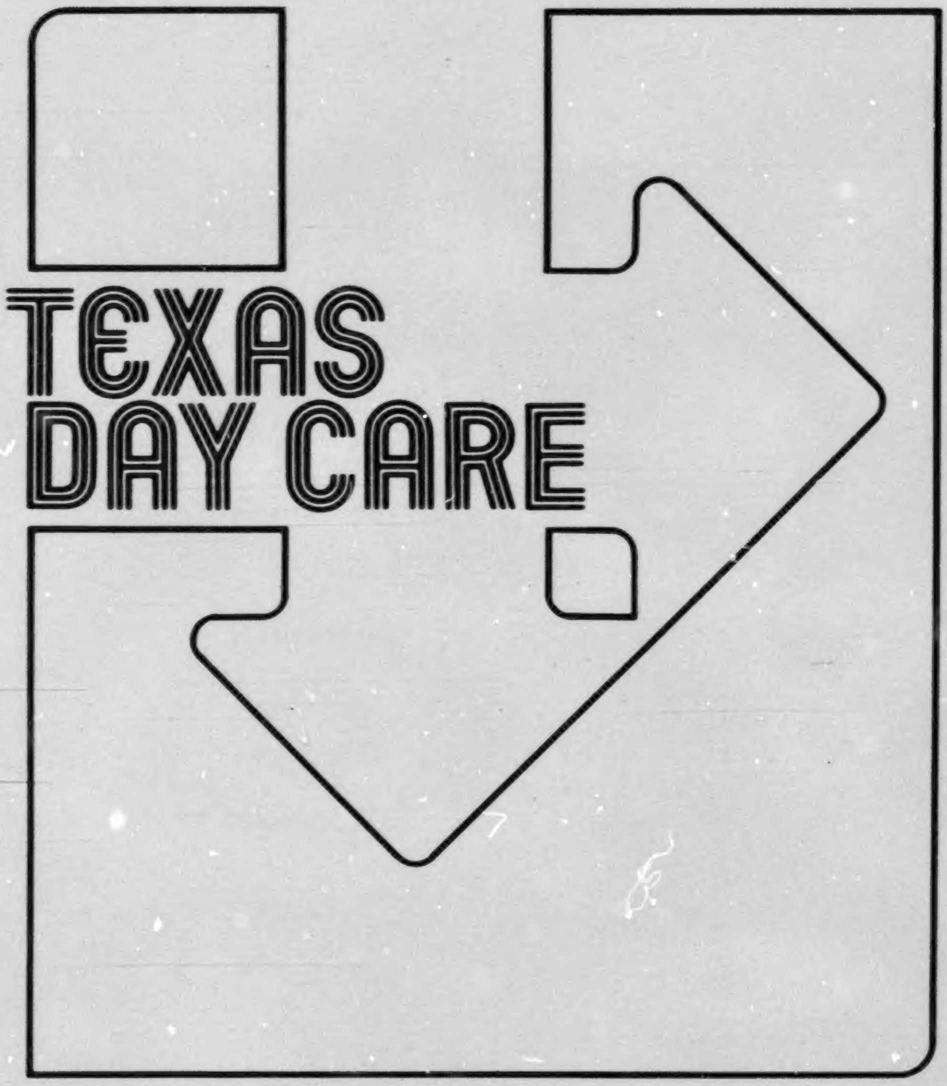
Arguments Against Fee Charging

1. The State has the financial responsibility to protect children. Under its basic police powers, the State should insure young children of proper care and protection. The State should be willing to use tax dollars to carry out this responsibility.
2. The cost of licensing would be passed on to the consumer. Day care costs are increasing rapidly and creating a hardship for the users of this service who are paying the full cost. This additional expense to the organization providing the services would result in increased charges to the consumer.
3. Quality licensing is more possible if licensing is independent from those being licensed. There is less possibility of pressure by the organization providing the service on the licensing worker if there is financial independence of the licensing staff.
4. Day care is a "welfare" service. The State has an obligation to protect children. If "welfare" imples "protection", then day care programs should accept this identification.
5. Many programs cannot afford a licensing fee. Non-profit programs charging users on a sliding scale basis would not be able to develop additional financial resources to pay the fee.
6. The right to operate a day care program should not be related to the ability to pay for the cost of licensing. A fee could eliminate many good programs which would benefit children.
7. Fee charging would add an additional expense to licensing which may offset the financial benefits of fee charging. It is argued that accounting expenses necessary to collect the fee will offset any proposed economic value of charging fees.

Other Issues To Be Considered

1. Should a fee be assess all day care program regardless of size? Should the fee be the same for family day care limited to 6 or less children and a day care center of over 6 children?
2. Should fees be charged only at the initial point of licensing or annually at the time of license revalidation?

APPENDIX III



TEXAS DAY CARE

A SUMMARY VIEW FROM THE COMMUNITY

STATE DEPARTMENT OF PUBLIC WELFARE
AND
OFFICE OF EARLY CHILDHOOD DEVELOPMENT
OF THE TEXAS DEPARTMENT OF COMMUNITY AFFAIRS

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FOREWORD

In the months of May and June, 1974, the State Department of Public Welfare and the Office of Early Childhood Development, Texas Department of Community Affairs, co-sponsored a series of four forums related to statutory issues in day care regulation. The forums were one-day meetings held in Dallas, San Antonio, Midland and Houston and were attended by persons drawn from that quarter of the state surrounding the site of the meeting. These persons were day care directors, judges, attorneys, educators, parents, and professionals from the fields of child development, health, and fire safety, as well as other persons with a direct or indirect interest in day care and laws relating to its regulation.

Funded by a grant from the Office of Child Development, U.S. Department of Health, Education and Welfare, the forums were planned to elicit response to four statutory issues regarding regulation of day care. These issues were enunciated in issue papers developed by specialized persons outside the agencies regulating day care:

> "Statutory Alternatives in the Development of an Effective Legal Framework for the Licensure of Day Care Facilities for Children," by D. Carolyn Busch, attorney, formerly with the State Department of Public Welfare, and a member of the federal government's task force on day care licensing;
>
> "Regulating Family Day Care Homes in Texas," by Gwen C. Morgan, Day Care and Child Development Council of America, Inc.;
>
> "Options in the Regulation of Pre-school Programs in Texas," by Joyce Wilson, Office of Early Childhood Development, in consultation with the State Department of Public Welfare and the Texas Education Agency;
>
> "Fee Charging in Day Care Licensing," by Malcolm S. Host, executive director, Neighborhood Centers–Day Care Association, Houston, Texas.

What follows is a summary of the high points of the papers and the responses of the forum participants to them. It should be stated that there was basic unanimity on one concept: all children being cared for during the day, away from their own home and parents, are entitled to the protection of the state. Beyond that agreement, only general trends or directions were discernible in response to the specific issues.

STATUTORY ALTERNATIVES IN THE DEVELOPMENT OF AN EFFECTIVE LEGAL FRAMEWORK FOR THE LICENSURE OF DAY CARE FACILITIES FOR CHILDREN

This paper raised a number of current issues in the Texas licensing statute and addressed several of them from the standpoint of the Models for Day Care Licensing, a model statute developed by the Office of Child Development, HEW. The issues identified were:

- whether licensing of children's facilities should be strictly an enforcement function or a mixture of regulation and consultation;
- whether there should be a "provisional" license;
- which agency is appropriate for administration of the licensing program;
- whether a license should be time-limited or valid until revoked;
- the clarity in the statute of provisions for denial, suspension or revocation;
- designation of the legal authority to enforce the licensing statute;
- whether the law should impose a criminal or civil sanction against violators.

In the four forums it was generally agreed that the current licensing statute is inadequate in many respects, and those who had had experience with the statute were cognizant of Miss Busch's identified issues.

Regarding the absence of clear statutory intent relating to enforcement versus combined enforcement and consultation, the majority of the forum participants favored the provision by the State Department of Public Welfare of consultation geared to upgrading the quality of child care. However, the near unanimous plea for stronger enforcement would indicate that consultation should flow through other DPW functions to permit the individual licensing agent to concentrate efforts on enforcement of the standards, with education and interpretation being limited to the statute and standards.

In the paper, the discussion of a provisional license contained a suggested life-span for such a temporary permit, that being a period not to exceed six (6) months. All the forum groups agreed that the current statute necessitates the issuance of licenses for new facilities before they can begin their "start-up activities," and therefore some change is called for. While there was general agreement on the need for a provisional license with a life-span of six-months, some discussion took place in terms of a 90-day provisional license. Also posed was the idea of less complicated denial provisions which would eliminate the need for a provisional license.

According to the paper, the licensing authority in 84% of the states is the department of welfare or its equivalent. There was little question at each forum regarding this issue; the large majority contended that the State Department of Public Welfare should continue as the designated licensing authority. Other possibilities mentioned but not pursued were the State Health Department, the Texas Education Agency, or individual city or county governments.

With further reference to other states, Miss Busch reported that Texas is the only state whose law does not place a time limit on child care licenses. All other states issue the license for a specific period and require renewal at the end of that period. The time period in most states is one year while in the other states the license is good for two, and in one instance three years. Although there are disadvantages to such an approach, the time limit concept was attractive to the forum participants because it promised to make enforcement more feasible by periodically requiring centers to show that they are continuing to meet licensing requirements, rather than requiring the state to prove otherwise. Generally, the groups were undecided on the length of the time period. The shortest suggested was six months while the longest was three years.

A recurring problem in the current statute is the dependence of the Department of Public Welfare on other functions which have essential roles in the licensing process. A specific area brought out was that of inspections for fire safety. Throughout the meetings support was expressed for a statewide fire safety code which would alleviate the dependency problem and make more realistic the time-limited license. Such a code could also shift the "burden of proof," again from the state to the licensee.

Forum participants who had had experience with the current statute's provisions for denial of an application or suspension or revocation of a license, were quite aware of the cumbersomeness of the provisions. In addition to their awareness, there was considerable expression of dissatisfaction with this system and recognition of its relationship to difficult enforcement. There were, therefore, no major disagreements with the recommendations that a de novo right of appeal be provided, that consideration be given to dropping the use of an advisory board in the appeal process, and that the provisions of the Model State Day Care Licensing Act dealing with this subject be considered for adoption in Texas.

In each forum there was substantial comment and discussion as to the proper legal authority to enforce (as opposed to administer) the licensing statute. While the current statute refers to enforcement by the county or district attorney, or the attorney general, clarification is needed on several fronts. Four possible sources of legal counsel for instituting injunctive actions were suggested in the issue paper: (1) the attorney general, (2) the district attorney, (3) the county attorney, (4) legal staff of the Department.

While there was some support for a statutory obligation being placed on local authorities such as the county or district attorney, the major support throughout the forums rested with providing the attorney general with responsibility for enforcement. Little interest was expressed in the concept of delegating legal authority for enforcement to the Department's legal staff. Most of the rationale for the preferred course of action lay in the feeling that locally elected persons would view pursuit of local licensing violations with varying degrees of commitment whereas it was felt that the attorney general would be more attuned to uniform enforcement. Likewise, it was viewed as appropriate that since a state agency would be the regulating body, then the state's attorney should be the enforcement authority.

Whether penalties of a civil or criminal nature should be attached to violations of the licensing statute was also discussed.

The majority of the forum participants tended toward civil penalties. It was generally agreed that a clearer, more definitive statute, plus the capabilities in civil penalties would effectively accomplish the objective of greater and more uniform enforcement.

ALTERNATIVES FOR REGULATING FAMILY DAY CARE HOMES IN TEXAS

"An enormous unmet need for day care, and a lack of public concern for the children of parents who are struggling to support their families has resulted in large numbers of underground arrangements. Unable to find quality care available in centers or licensed homes, parents have turned to unregulated homes."

Following this opening statement, Gwen Morgan proceeded to compare Texas to other states, saying that no state has derived a solution to the problem of enough licensed or regulated spaces for all the children who require care outside the home for part of the day. Following a brief review of previous research by the State Department of Public Welfare and the Office of Early Childhood Development, all of which contained much statistical data on children in unlicensed day homes and the day homes themselves, Ms. Morgan addressed the mammoth task of attempting to bring thousands of often invisible family day homes into conformity with the law. Not only is the low visibility a problem, but once identified, that which constitutes sufficient regulation for the protection of children brings up other difficult considerations.

Proceeding from further research related to what is happening elsewhere, Ms. Morgan outlined some of the arguments against traditional licensing as now administered, a few of which are:

- requirements for large numbers of licensing staff, costing a great many tax dollars;
- difficulty in uniform enforcement;
- lack of public support for licensing, which is often viewed as an unwelcome intrusion on parent's own decision-making;
- potential damage to support for licensing center care;
- poor coverage arising from inadequate numbers of staff;
- erosion of home-like atmosphere in the family day home;
- bringing the licensee under the jurisdiction of other authorities derived from statute.

Ms. Morgan provided additional comment that changes have taken place in the American society which have led to the need for licensing. One is that ours is a society technically specialized where ordinary citizens must look to the state for protection. Another is the change to a society in which there is much mobility. Persons are more likely to be strangers to each other so that community supervision (as in earlier past) cannot be fully depended upon in many locations. But, Ms. Morgan contended, family day care may be more subject to community supervision than center care; parents have more opportunity to assess the impact and quality of care. Therefore, the informal, non-technical and oftentimes short time of home care may be less subject to licensing.

Texas might consider six alternatives as it decides on a course of action for regulating family day homes:

1. maintain the status quo
2. redefine family day care, exempting homes caring for less than three children or only one family

3. improve the licensing administration—license "systems"
4. completely abolish licensing
5. register the family day care homes
6. some combination of the above

Alternatives 1, 2, 4, and 6 are somewhat self-explanatory. Alternatives 3 and 5, however, deserve further comment.

Number 3 is modeled after a Massachusetts concept defined in that state's law which provides for licensing a system which administers centrally a group of satellite day care homes. The homes are approved by the system on the basis of state requirements. The system is required to meet additional requirements relative to the number and qualifications of staff, ratio of staff to homes, services to the homes, and other facets relative to central administration.

Alternative number 5, registration of family day care homes, is an approach with which no national experience has been obtained, but in which a number of states have expressed interest. Not withstanding the absence of experience, however, a number of models have been developed hypothetically.

Registration with Requirements

In this model, states register family day care homes, requiring them to meet certain demands. Regulatory staff would not visit the home unless prompted by a complaint or request for assistance. Parents and communities would be expected to carry more responsibility for safety of the children since there would be wide distribution of the requirements in simple form. This model differs from traditional licensing, therefore, in that there would be no inspection prior to operation nor any collecting of information on the provider.

Registration with Required Training

This model would require through statute that all family day care homes register, and that a prerequisite to registration be the completion of at least 6-8 hours of training provided by the state, free, to the potential care-giver.

Simple Registration

This model is, as implied, simple registration which would provide the state with a record of all providers and with certain necessary statistics. No supervision of the homes would be required nor would any requirements be promulgated. The emphasis would be on playing a helpful role to identify the providers so as to send them educational materials. Materials could include standards but only as educational tools and not as requirements.

Ms. Morgan concluded her paper with a discussion of creating incentives for day home operators to submit to regulation under a system simpler and less detailed than traditional licensing. She also addressed the area of a contextual basis for decisions among the alternatives. This basis is within certain assumptions on the part of Ms. Morgan arising from her knowledge and experience.

Throughout all the forums it was apparent that there is widespread knowledge of and concern about unlicensed family day care home operations. Not only were licensed operators expressive of such concern, but others not directly involved in day care were frustrated that children are being cared for in unregulated situations. This concern arose from a basic tenet espoused almost unanimously: that all children in all out-of-the-home care situations have both a need for and a right to some degree of protection by the state. Likewise related to the issue was a fact addressed in both Ms. Morgan's paper and in other discussions at the forums; that is the existence of a statute implies uniform and equal application of the law. Under current circumstances, the law is not being adhered to uniformly and equally. Thus, none of the forums were in favor of (1) maintaining the status quo with regard to family day homes or (2) abolishing the licensing law entirely.

The concept of exempting certain family day homes (i.e., those caring for less than three children or children of one family) met with some approval. There persisted, however, some concern that while this approach might achieve better coverage, it would still leave many children in unregulated, and therefore unprotected situations. There was also question about the extent to which it would provide additional coverage. An added concern was whether the state could realistically commit the resources necessary to license the remaining, non-exempt family day homes.

The alternative of licensing day home "systems" was not greeted with notable enthusiasm. This appeared to be attributable to a question of practicality in that a vast amount of family day home care is provided in non-urban and often unsophisticated rural areas. In such areas, efforts to provide central control would be administratively difficult, resulting in a continuation of privately arranged, underground kinds of care situations. It was recognized that the application of this concept might be more practical in localities where day care tends to be a well organized institution.

Registration of family day care homes was the alternative which received the greatest amount of discussion in each of the four forums. It was apparent that most persons in attendance perceived regulation as synonymous with licensing. Registration as a form of regulation in the day care field was something of a new idea to most persons in the groups.

Given the groups' concerns that the status quo not be allowed to continue and their rejection of the idea of abolishing licensing altogether, the idea of registration held some attraction for a large portion of the participants. As stated above, it was generally recognized that attempting to strengthen the licensing agency by hiring sufficient staff to license all family day homes would be unrealistic. Further, many facilities would resist licensing, either by procrastination or by outright avoidance of the issue. It was, rather, commonly felt that registration as opposed to licensing might not only be more palatable to day home operators, but might find greater support for regulated child care from the community at large, since registration would carry somewhat less state control than licensing.

There were some participants, mainly day care center people, who felt day homes should be licensed or at least be required to meet certain minimum standards akin to those required for day care centers. The main source for this attitude was the feeling that children in day homes are as much at risk, if not more, than children in centers. Yet there was still recognition that to require adherence to standards implies either more agency staff or a continuation, with some variation, of the status quo.

Having expressed support of the concept of registration, there was little discernible preference for either of the types of registration. The least desirable mode of registration was the "simple" registration approach. The groups were in basic agreement that such an approach offers little protection to children if it is limited to a mere "signing-up" with no provision for supervision.

Registration with training found a considerable amount of favor in the groups. Restraining the enthusiasm, however, was the question of adequacy of state resources to provide training of sufficient quality to justify the effort. Implications for planning and delivering the training to a group with such varied educational and other backgrounds also dampened the concept somewhat.

If any of the registration models enjoyed a larger portion of the groups' support, it would be the registration with requirements model. In this model, it will be recalled, the facility would be required to meet certain basic health and safety requirements and other requirements not as specific or detailed as licensing standards. Regulatory staff would not routinely visit or supervise centers, since the parents and community will have been assured by the facility that the requirements have been met. Parents and others will be more aware because of publication and distribution of the necessary requirements. It appeared that this model held the potential of greater community involvement and would give greater responsibility to parents for insuring that their children are adequately cared for, while likewise bringing the facility more practically under the jurisdiction of regulation than is presently the case.

Again, it should be pointed out that agreement on one basic fact persisted: regardless of the mode of regulation utilized, children in care away from their parents are entitled to the protection of the state.

OPTIONS IN THE REGULATION OF PRE-SCHOOL PROGRAMS IN TEXAS

Working in cooperation and consultation with State Welfare and Texas Education Agency staff, Ms. Wilson opened this issue paper with a statement of the issue itself: "What role should the state play in the regulation of private educational facilities for pre-school children?"

Having reviewed the licensing statute and various attorney general opinions, the point was made that in the absence of a statutory definition of pre-school programs that are bonafide educational programs, as opposed to day care, a facility's primary function would have to be determined by the Welfare Department on an individual basis. She stated further that it should be the task of the Welfare Department to establish criteria for use in making the distinction. In response, DPW has developed a policy which requires licensure of a so-called educational program if:

1. children are in care for more than four hours per day; or
2. a regular meal is served; or
3. children under age three years are in care.

The Texas Education Agency likewise does not have legal authority over private nursery schools and private kindergartens, but a private school with at least six grades meeting minimum standards may be voluntarily accredited by the Texas Education Agency. This provision, however, as stated, excludes pre-school operations.

Hence, the issue may be separated into three component parts:

1. What is a bonafide educational facility?
2. Should such facilities be regulated by the state?
3. If there is to be regulation,
    a. where should regulatory responsibility be placed?
    b. what should the regulatory policy be?

A review of what other states are doing in the matter of regulating such facilities indicates that the dilemma is not peculiar to Texas. There is a wide variation of approaches ranging from licensure as day care versus educational, exempting public-owned and operated facilities or systems from regulation, regulating nursery schools while exempting kindergartens, or vice versa, to exempting private nursery schools and kindergartens.

The paper discussed the issue of the complete absence of a definition of a "bonafide educational facility" in Texas law. While TEA may accredit certain programs, not all aspects of the individual facility's operation come under scrutiny. Further, TEA has moved somewhat into the area of curriculum and staff qualifications although some early childhood development professionals view excellence in this area from a different standpoint than does the TEA. In any event, the suggestion is made that Texas adopt a definition for "bonafide educational facility" which could be adapted to conform with the approach taken by the state in the area of educational licensing. As to the issue of state licensing, those who believe that educational facilities should be licensed offer as a rationale the following:

> All children in out-of-home group care situations need the protection from physical and mental harm which may result in the absence of the influence of an outside regulatory agency. The length of the program or the program content does not affect this need . . . .

Opposition to regulation of such facilities is based on variations of the following:

> By developing a set of standards that apply to all facilities equally, the state may be eliminating some innovative programs that have aspects in conflict with the standards . . . Parents have the right . . . to choose . . . for their children, and the state should not . . . say what . . . children should have.

If there is to be regulation, how is it to be carried out? Decisions must be made in these areas of placement out of responsibility and enunciation of policy:

1. Whether to maintain the status quo in state regulation of pre-school educational facilities with their lack of protection for children in unregulated facilities.
2. Whether to have separate standards for day care versus educational facilities
3. Whether to employ a joint effort between DPW and TEA in developing standards, leaving the enforcement function solely to DPW.
4. Or, the Department of Public Welfare could retain regulatory authority but contract with Texas Education Agency for formulation of standards and enforcement of same.
5. The statute could make Texas Education Agency responsible for regulation of pre-school educational programs while leaving the Department of Public Welfare responsible for licensing all other facilities.
6. A last alternative would provide that the Texas Education Agency regulate all such group programs for young children.

It has been stated elsewhere in this summary that all forum participants were solidly committed to the concept that all children in group programs out of the home, whether it be for substitute care or for formal learning, are entitled to, and should be extended the protection of the state. This commitment was nowhere more apparent than in the discussion of regulation of pre-school educational programs. They felt strongly that there should be no distinction on the basis of hours, age of children, or whether a meal is served.

Generally, while there was no particular preference voiced for any alternative, the prevailing mood of the groups tended to lie in designation of the Department of Public Welfare as the regulatory agency. There seemed to be no major disagreement with the idea that what constitutes minimum protection of children in day care centers differs little from protection of the same kinds of children in nursery schools and kindergartens.

Variations in group thinking became more apparent in the area of formulation of standards for pre-school education facilities. Notwithstanding some degree of sentiment for collaboration between several agencies and the Department of Public Welfare, the seemingly most popular alternative was collaboration between the Department of Public Welfare and the Texas Education Agency with regulatory responsibility resting with the Department of Public Welfare. One group posed the idea that a facility holding itself out to be educational be required to meet standards and be licensed by the Education Agency and following such Texas Education Agency licensure, be required to meet Department of Public Welfare promulgated standards relative to health and safety requirements as well as other non-educational facets of the operation.

Whichever alternative is chosen, however, the groups were unanimous in stressing the need for strong enforcement.

FEE CHARGING IN DAY CARE LICENSING

The issue addressed in this paper was: "Should a fee be charged for the licensing of a day care facility?"

After briefly reviewing the history of licensing, Mr. Host stated that because day care has grown into a sizable function, greater time and effort by regulatory staff is required. Such demands require money and other resources.

From a philosophical viewpoint, licensing in day care represents:

a. a form of regulatory administration;

b. regulation of facilities under private auspices;

c. a means of securing conformity to standards and upgrading services;

d. a preventive program.

Other regulatory groups charge a fee for licensing, and the paper enumerated some of these. Generally, fees are charged in these situations for defraying the cost of licensing activities and to control who will be eligible to provide the service. In day care, on an estimated national level, one quarter of the states charge no fee; the remaining states charge a fee ranging in some states from $1 to $2 and in some from $5 to $15. According to Mr. Host, the fee is usually used to help defray the cost of licensing.

Mr. Host enunciates arguments for fee charging:

a. to support the licensing process;

b. to ensure competency of the licensing procedure;

c. to remove day care from being a "welfare" service;

d. to control who provides day care;

e. to avoid tax-subsidized consultation.

Arguments against fee charging are:

a. the state has the financial responsibility to protect children;

b. cost of fees would be passed on to the consumer;

c. quality is more possible in licensing if licensing is independent from those being licensed;

d. day care *is* a "welfare" service;

e. many programs cannot afford a fee;

f. the right to operate a program should not be related to ability to pay for licensing;

g. collection costs would offset any fiscal benefit of charging a fee.

Related issues stated in the concluding remarks of the issue paper are:

a. Should a fee be assessed all programs regardless of size?

b. Should a fee be charged at the time of initial licensing or at the time of each renewal or revalidation?

Forum reactions to the concept of fee charging generally ranged from lukewarm opposition to lukewarm support. The overriding concern on both sides of the issue was that fees necessarily would be too high if, after collection costs, there would be sufficient balance to defray agency cost of licensing, including payment for the training of workers. Moreover, if the fee were less than needed for such endeavors, it would be of such insignificance that the cost of collection would absorb that collected, and nothing of substantial value will have been gained. There was also concern that indeed the cost would be passed on to the already hard-pressed consumer.

Interestingly enough, the forum participants were attracted to some of the other means of regulation, aside from fee charging. The psychological gains inherent in some fee charging, it was felt, might be attained through other means, such as accreditation or licensing the directors of day care facilities. In each forum there was discussion of the latter. The concept of such licensure derives in large part from the statute, passed as Senate Bill 180, Acts of the 63rd Legislature Regular Session, 1973, which requires licensure of administrators of child care institutions.

All in all, there was no solid acceptance of fee charging in day care licensing.

APPENDIX IV

Child Care Licensing Act of 1975

THE STATE OF TEXAS

State Department of Public Welfare

The State of Texas

SECRETARY OF STATE

I, MARK WHITE, Secretary of State of the State of Texas, DO HEREBY CERTIFY that the attached is a true and correct copy of Senate Bill No. 965 as passed by the 64th Legislature, Regular Session, 1975, signed by the Governor on June 21, 1975, and filed in this office on June 21, 1975.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this

.... day of .... A. D. 19.......

Mark White

Secretary of State

S. B. No. 965

AN ACT

relating to the regulation of certain child care facilities and child placing agencies by the State Department of Public Welfare through a division of the department; authorizing advisory committees; providing for licensure, certification, or registration of certain child care facilities and child placing agencies; providing the powers and duties of the State Department of Public Welfare and the division within the department; relating to the immunization of children and the duties of the State Department of Health in regard thereto; requiring certain records; requiring certain reports by the division to the governor; providing for administrative and judicial appeals; providing extent of application of the Administrative Procedure and Texas Register Act; providing sanctions and penalties for certain violations; providing enforcement procedures; providing a saving clause and an effective date; repealing Section 8(a) of the Public Welfare Act of 1941, as amended (Article 695c, Vernon's Texas Civil Statutes); and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS;

Section 1. (a) TITLE. This Act may be cited as the Child Care Licensing Act.

(b) LEGISLATIVE INTENT AND DECLARATION OF PURPOSE AND POLICY. It is the legislative intent to protect the health, safety, and well-being of the children of the state who reside in child care facilities. Toward that end, it is the purpose of this Act to establish statewide minimum standards for the safety and protection of children in child care facilities, to insure maintenance of these standards, and to regulate such conditions in such facilities through a program of licensing. It shall be the policy of the state to insure protection of children under care in child care facilities, and to encourage and assist in the improvement of child care programs. It is the further legislative intent that the freedom of religion of all citizens shall be inviolate. Nothing in this Act shall give any governmental agency jurisdiction or authority to regulate, control, supervise, or in any way be involved in the form, manner, or content of any religious instruction or the curriculum of a school sponsored by a church or religious organization.

Sec. 2. DEFINITIONS. As used in this Act:

(1) "Department" means the State Department of Public Welfare.

(2) "Division" means the division established or designated by the State Department of Public Welfare to carry out the provisions of this Act.

(3) "Child care facility" means a facility providing care, training, education, custody, treatment, or supervision for a child who is not related by blood, marriage, or adoption to the owner or operator of the facility, for all or part of the 24-hour day, whether or not the facility is operated for profit, and whether or not the facility makes a charge for the service offered by it.

(4) "Child" means an individual under 18 years of age.

(5) "Person" includes an individual, a public or private agency, an association, or a corporation.

(6) "Child caring institution" means a child care facility which provides care for more than 12 children for 24 hours a day, including facilities known as children's homes, halfway houses, residential treatment camps, emergency shelters, and training or correctional schools for children.

(7) "Foster group home" means a child care facility which provides care for 7 to 12 children for 24 hours a day.

(8) "Foster family home" means a child care facility which provides care for not more than 6 children for 24 hours a day.

(9) "Day care center" means a child care facility which provides care for more than 12 children under 14 years of age for less than 24 hours a day.

(10) "Group day care home" means a child care facility which provides care for 7 to 12 children under 14 years of age for less than 24 hours a day.

(11) "Registered family homes" means a child care facility which regularly provides care in the caretaker's own residence for not more than 6 children under 14 years of age, excluding the caretaker's own children, and which provides care after school hours for not more than 6 additional elementary school siblings of the other children given care, provided that the total number of children including the caretaker's own does not exceed 12 at any given time.

(12) "Family day home" means a child care facility which provides care for not more than 6 children under 14 years of age for less than 24 hours a day not in the caretaker's own residence nor in the residence of one or more of such children.

(13) "Agency home" means a private home providing care for not more than 6 children, which is used only by a licensed child placing agency, and which meets division standards.

(14) "Child placing agency" means a person other than the natural parents or guardian of the child who plans for the placement of or places a child in an institution, agency home, or adoptive home.

(15) "State of Texas" or "state" does not include political subdivisions of the state.

(16) The term "facilities" without the modifier "child care" includes child care facilities and child placing agencies.

Sec. 3. DIVISION. (a) The State Department of Public Welfare shall establish or designate a division within the department for the licensure and regulation of child care facilities and child placing agencies and the enforcement of the provisions of this Act and the regulations and standards adopted pursuant thereto and such other duties and responsibilities as the department may delegate or assign.

(b) The commissioner of the department shall appoint as director of the division an individual qualified in one of the following ways:

(1) by meeting the qualifications required of a child care administrator by Chapter 231, Acts of the 63rd Legislature, Regular Session, 1973 (Article 695a-1, Vernon's Texas Civil Statutes);

(2) by holding a graduate degree in social science or law and having five years administrative experience in a field related to child care; or

(3) by having 10 years' experience in a field related to child care, at least five of which must be administrative.

(c) The department shall employ sufficient personnel and shall provide adequate training to the persons employed to carry out the provisions of this Act.

(d) The director may divide the state into regions for the purposes of administering this Act.

Sec. 4. REQUIRED LICENSE. (a) No person may operate a child care facility or child placing agency unless he holds a valid license issued by the division.

(b) This section does not apply to:

(1) state-operated facilities;

(2) agency homes;

(3) facilities operated in connection with a church, shopping center, business, or establishment where children are cared for during short periods of time while parents or individuals in charge of the children are attending church services, shopping, or engaging in other activities on or near the premises, which with respect to churches or other religious institutions shall include but not be limited to Sunday school, retreats, or weekly catechism or other schools or classes for religious instruction;

(4) schools or classes for religious instruction conducted by churches during the summer months for not more than two weeks, known as vacation Bible schools;

(5) youth camps licensed by the State Department of Health;

(6) hospitals licensed by the Texas Department of Mental Health and Mental Retardation or the State Department of Health;

(7) an educational facility accredited by the Central Education Agency or the Southern Association of Colleges and Schools that

operate primarily for educational purposes in grades kindergarten and above;

(8) an educational facility that operates solely for educational purposes in grades kindergarten through at least grade two and does not provide custodial care for more than one hour during the hours before or after the customary school day, and are members of an organization which promulgates, publishes, and requires compliance with the health, safety, fire, and sanitation standards at least equal to those required by state, municipal, and county health, safety, fire, and sanitation codes;

(9) kindergarten or preschool educational programs operated as part of the public schools of this state or of private schools accredited by the Central Education Agency that offer educational programs through grade six and that do not provide custodial care during the hours before or after the customary school day.

(10) registered family homes as defined in Section 2 of this Act.

(c) In the event that a child caring institution operates facilities that are noncontiguous, but of a near proximity and demonstratable singleness of operation (as determined by patterns of staffing, finance, administrative supervision, and programs) a single license may be issued to the institution noting the addresses and facilities appropriate.

Sec. 5. RULES, REGULATIONS, AND STANDARDS. (a) The department shall promulgate reasonable rules and regulations to carry out the provisions of this Act.

(b) The department shall promulgate minimum standards for child care facilities covered by this Act which will:

(1) promote the health, safety, and welfare of children attending any facility;

(2) promote safe, comfortable, and healthy physical facilities for children;

(3) insure adequate supervision of the children by capable, qualified, and healthy personnel;

(4) insure adequate and healthy food service, where it should be offered;

(5) prohibit racial discrimination by child care facilities; and

(6) include procedures by which parents and guardians are given opportunity for consultation in formulation of the children's educational and therapeutic programs.

(c) In promulgating minimum standards for child care facilities, the department should take cognizance of the various categories of facilities, including facilities offering specialized care, and the various categories of children and their particular needs. Standards for child care institutions must require an intake study before a child is placed in an institution. The study may be conducted at a community mental health and mental retardation center.

(d) In promulgating minimum standards the department may take cognizance of, and may differentiate with respect to, the following child care facilities: child caring institutions, foster homes, day care centers, group day care homes, family day homes, registered family homes, and agency homes.

(e) The department shall promulgate minimum standards for child placing agencies.

(f) The department shall promulgate standard forms for applications and inspection reports.

(g) The department shall promulgate a standard procedure for receiving and recording complaints and a standard form for complaints.

(h) Before adoption of minimum standards, the division shall present the proposed standards to the State Advisory Committee on Child Care Facilities for its review and comment and shall send a copy of the proposed standards to each licensee covered by the proposed minimum standards at least 60 days prior to the effective date of the proposed standards in order to enable the persons to review the proposed standards and make written suggestions to the department and the council.

(i) A comprehensive review of all standards, rules, and regulations must be made at least every six years.

(j) The department shall not regulate or attempt to regulate or control the content or method of any instruction or the curriculum of a school sponsored by a church or religious organization.

(k) The department may in specific instances waive the compliance with a minimum standard on a determination that the economic impact is sufficiently great to make such compliance impractical.

Sec. 6. RULES RELATING TO IMMUNIZATION OF CHILDREN. (a) The department shall promulgate rules and regulations relating to immunization of children admitted to facilities.

(b) The rules shall require the immunization of each child at an appropriate age against diphtheria, tetanus, poliomyelitis, rubella, and rubeola and a test for tuberculosis, and the immunization must be effective on the date of first entry into the facility; provided, however, a child may be provisionally admitted if he has begun the required immunizations and if he continues to receive the necessary immunizations as rapidly as is medically feasible.

(c) The State Department of Health shall promulgate rules and regulations relating to the provisional admission of children to facilities. The State Board of Health may modify or delete any of the immunizations listed in this section or may require immunization against additional diseases as a requirement for admission to facilities; but no form of immunization shall be required for a child's admission to a facility if the person applying for the child's admission submits either an affidavit signed by a doctor in which it is stated that, in the doctor's opinion, the immunization would be injurious to the health and well-being of the child or of any member of his family or household, or an affidavit signed by the parent or guardian of the child stating that the immunization conflicts with the tenets and practice of a recognized church or religious denomination of which the applicant is an adherent or member.

(d) Each facility shall keep an individual immunization record for each child admitted, and the records shall be open for inspection by the division at all reasonable times.

(e) The State Department of Health shall provide the required immunizations to children in areas where no local provision exists to provide these services.

Sec. 7. INSPECTION. (a) An authorized representative of the division may visit a child care facility or child placing agency during the hours of operation for purposes of investigation, inspection, and evaluation.

(b) The division shall inspect all facilities licensed or certified by the division at least once a year and may inspect other facilities as necessary. At least one of the yearly visits must be unannounced, and all may be unannounced.

(c) An investigation visit must be made if a complaint is received by the division. The division representative must notify the director or authorized representative of the director of the facility being investigated that a complaint is being investigated. The results of the investigation must be reported in writing to the director.

(d) The division may call on political subdivisions and governmental agencies for appropriate assistance within their authorized fields.

Sec. 8. CONSULTATION. (a) The department shall offer consultation to potential applicants, applicants, licensees, and holders of certification in meeting and maintaining standards for licensing and certification and in achieving programs of excellence related to the care of children served.

(b) The department shall offer consultation to prospective and actual users of facilities.

Sec. 9. ADVISORY OPINIONS AND DECLARATORY ORDERS. (a) The director of the division may give advisory opinions on compliance of planned facilities or planned changes in existing facilities with division rules, regulations, and minimum standards.

(b) If a written opinion signed by the director of the division and the division representative administering this Act in a division region is acted on by an applicant or licensee, it is binding upon the division as a declaratory order.

Sec. 10. RECORDS. (a) All persons operating a licensed or certified child care facility or child placing agency shall maintain individual child development records, individual health records, statistical records, and complete financial records.

(b) All persons operating a licensed facility, other than a child care facility which provides care for less than 24 hours a day, or an agency home, shall have its books audited annually by a certified public accountant and include a copy of the accountant's statement of income and disbursements with each application for a license.

Sec. 11. ISSUANCE OF LICENSE. (a) A person desiring to operate a child care facility or child placing agency shall apply in writing to the division for a license.

(b) The division shall supply the applicant with the appropriate application forms and a copy of the appropriate minimum standards.

(c) On receipt of the application, the division shall conduct an investigation of the applicant and the plan of care for children.

(d) The division shall complete its investigation and render a decision on the application within two months after receipt of the application.

(e) If the division determines that the facility has reasonably satisfied all requirements, it shall issue a license.

(f) In issuing a license, the division may impose restrictions on the facility, including, but not limited to, the number of children to be served and the type of children to be served.

(g) A variance of an individual standard set forth in the standards may be granted for good and just cause by the division.

(h) A license applies only to the location stated on the application and license issued and is not transferable from one person to another or from one place to another. If the location of the facility is changed or the owner of the facility is changed, the license is automatically revoked.

(i) The licensee must display the license in a prominent place at the facility.

(j) Prior to expiration of its license, a facility may apply for a new license in accordance with the provisions of this Act and the rules and regulations promulgated by the division. The application must be completed and acted on prior to the expiration of a license. Evaluation to determine if the applying facility meets all requirements must include a specified number of visits to the facility and review of all required forms and records.

Sec. 12. PROVISIONAL LICENSE. (a) The division shall issue a provisional license to a facility whose plans meet the department requirements but which is (1) not currently operating, (2) not licensed for the location stated in the application, or (3) changing ownership.

(b) A provisional license is valid for six months from the date of issuance and is nonrenewable.

Sec. 13. BIENNIAL LICENSE. (a) A biennail license will be issued if the division determines that the facility meets all requirements on a continuing basis. The evaluation shall be based on a specified number of visits to the facility and a review of all required forms and records.

(b) A biennial license shall be valid for two years.

Sec. 14. CERTIFICATION AND REGISTRATION. (a) Child care facilities and child placing agencies operated by the state, and registered family homes, are exempt from the licensing requirements of this Act, but state operated facilities must receive certification of approval from the division and registered family homes must be registered.

(b) To be certified, the facilities must meet all department standards, rules and regulations, and provisions of this Act that apply to licensed facilities of the same category. The operator of a certified facility must display the certification in a prominent place at the facility. Certification of approval must be renewed every two years.

(c) To be registered, the facility must meet department standards, rules, regulations, and provisions of this Act that apply to registered facilities.

Sec. 15. AGENCY HOMES. (a) An agency home is exempt from the licensing requirements of this Act but shall be considered part of the child placing agency operating the home when the agency is licensed.

(b) The agency homes must meet all department standards, rules and regulations, and provisions of this Act that apply to child care facilities caring for a similar number of children for a similar number of hours each day.

(c) The operator of the licensed agency must display a copy of the license in a prominent place at an agency home used by the agency.

(d) If an agency home fails to meet the requirements of Subsection (b) of this section, the division shall suspend or revoke the license of the child placing agency.

Sec. 16. STATE ADVISORY COMMITTEE. (a) The State Advisory Committee on Child Care Facilities is hereby established.

(b) The commissioner of the department shall appoint 15 citizens to serve as members of the committee for terms of two years.

(c) The members must represent the following groups:

(1) parents, guardians, or custodians of the children who use the facilities;

(2) child advocacy groups;

(3) operators of the facilities; and

(4) experts in various professional fields which are relevant to child care and development.

(d) At least three members of the division staff shall meet with the committee, and the division shall provide staff necessary for the committee.

(e) The committee shall review rules and regulations and minimum standards relating to child care facilities and child placing agencies promulgated by state agencies, and shall advise the department and the division, the council, and state agencies on problems of child care facilities and child placing agencies.

(f) The committee shall receive and review the annual report of the division.

(g) The committee shall meet twice a year, and the members shall receive their actual travel expenses and the state per diem.

Sec. 17. ANNUAL REPORT. (a) The division shall present to the governor, lieutenant governor, and members of the legislature an annual report of its activities.

(b) The annual report must include:

(1) a report by regions of applications; provisional licenses issued, denied, suspended, and revoked; licenses issued, denied, suspended, and revoked; emergency closures and injunctions; and compliance of state operated agencies with certification requirements;

(2) a summary of the amount and kinds of in-service training and other professional growth opportunities provided to division staff;

(3) a summary of training and other professional growth opportunities offered to child care facilities staff;

(4) a report of new administrative procedures, of the number of staff and staff changes, and of plans for the coming year.

(c) Copies of the annual report shall be made available to any citizen of the state upon request.

Sec. 18. SUSPENSION. (a) If a facility has temporarily suspended operations but has definite plans for renewing operations within the time limits of the issued license, the division may suspend the license.

(b) If the division finds repeated noncompliance with standards that do not endanger the health or safety of the children, the division has the option of suspending the license for a definite period of time instead of denying or revoking the license. In order to qualify for suspension under this subsection, the facility must:

(1) show it can meet the standards within the suspension period, and

(2) suspend its operations.

(c) If a facility does not comply with standards after the suspension, the division must deny or revoke its license.

Sec. 19. DENIAL OR REVOCATION. (a) If the division finds that a facility does not comply with the provisions of this Act, the department standards, department rules and regulations, or the specific terms of a license or certification, it must deny or revoke the license or certification of approval.

(b) The division must notify the person operating or proposing to operate the facility of the reasons for the denial or revocation and the person's right of appeal within 30 days of receipt of the director's notification.

(c) If the person wishes to appeal, he must notify the director by certified mail within 30 days and must state in the notification the reasons against denial or revocation. The person must send a copy of the notification to the assigned division representative.

(d) Within two weeks following the date the appeal notification was mailed, the director shall notify the person that the request for an appeal hearing is denied, or he shall appoint an advisory review board to hear the appeal.

(e) Within two weeks following notification to the person that an advisory review board will hear his case, the director shall appoint five of the person's peers to an advisory review board and shall set a date for the hearing. The date for the hearing must be within four weeks following the date of the appointment of the members.

(f) The advisory review board shall hear the appeal and render an advisory opinion to the director within one week of the hearing. The board members shall receive actual travel expenses and state per diem for each day of the hearing.

(g) The advisory opinion will be reviewed by a committee composed of the director, the division representative responsible for establishing standards, and the division representative administering this Act in the region in which the facility is located. The committee shall render a decision within two weeks after receiving the advisory opinion and shall notify by certified mail the person of its decision.

(h) Within 30 days after receipt of the committee's decision, the person whose license has been denied or revoked may challenge the decision in a suit filed in a district court of Travis County or the county in which the facility is located. The trial shall be de novo.

(i) On request by a person challenging a division decision in a court suit, the division shall supply him with a copy of the verbatim transcript of his advisory review board hearing, at his expense. Records of the hearing shall be kept for one year after a final decision is rendered.

(j) Unless the division uses the procedures set forth in Section 22 or 23 of this Act, a person may continue to operate a facility during an appeal of the denial or revocation of its license.

Sec. 20. The Administrative Procedure Act, S. B. No. 41, Acts of the 64th Legislature, Regular Session, 1975, applies to all procedures and proceedings under this Act, except where it is contrary or inconsistent with the provisions of this Act, in which case the provisions of this Act shall govern.

Sec. 21. CLOSURE OF A FACILITY. (a) If the division finds any violation of this Act or the department's minimum standards or rules and regulations by a facility other than a state-operated facility that places the children in the facility in immediate peril, it may close the facility and place the children attending the facility in another facility.

(b) A division representative finding conditions that place children in a facility in peril shall immediately contact the director of the division and request the director or his designee to immediately inspect the facility for verification of the conditions.

(c) If the division finds any violation of this Act or the department's minimum standards or rules and regulations by a state operated facility that threatens serious harm to the children in the facility, the division representative shall immediately report the finding to the governor and the commissioner of the department.

(d) Closure under this section is an emergency measure. After closing a facility, the division must seek an injunction against continued operation of the facility as prescribed in Section 22 of this Act.

Sec. 22. INJUNCTIVE RELIEF. (a) Whenever it appears that a person has violated or is violating or threatening to violate any provision of this Act or of any rule, regulation, or standard of the department, the division may cause a civil suit to be instituted in a district court of Travis County or in the county in which the facility is located, for injunctive relief, including temporary restraining orders, to restrain the person from continuing the violation or threat of violation, or for the assessment and recovery of a civil penalty of not less than $50 nor more than $1,000 for each day of violation and for each act of violation, as the court may deem proper, or for both injunctive relief and civil penalties. Upon application for injunctive relief and a finding that a person is violating or threatening to violate any provision of this Act or of any rule, regulation, standard, or order of the board, the district court shall grant the injunctive relief the facts may warrant.

(b) At the request of the division, the attorney general shall institute and conduct a suit in the name of the State of Texas for injunctive relief or to recover the civil penalty, or for both injunctive relief and penalty, as authorized in Subsection (a) of this section.

Sec. 23. CIVIL PENALTY. Any person who violates any provision of this Act or rule, regulation, or standard of the department which threatens serious harm to the children in the facility, or who violates any provision of this Act or rule, regulation, or standard of the department three or more times within a period of a year, or who operates a facility without a license or certification as required under this Act, or who places a public advertisement for an unlicensed facility, is subject to a civil penalty of not less than $50 nor more than $1,000 for each day of violation and for each act of violation, as the court may deem proper. Civil penalties shall be cumulative and in addition to the remedies of injunction and criminal penalties provided in this Act.

Sec. 24. CRIMINAL PENALTY. (a) A person operating a child care facility or child placing agency without a license is guilty of a Class B misdemeanor.

(b) A person placing a public advertisement for an unlicensed facility is guilty of a Class C misdemeanor.

Sec. 25. PRIOR ISSUED LICENSES. Licenses issued before the effective date of this Act remain valid for a period not to exceed two years from the effective date of this Act.

Sec. 26. REPEALER. Section 8(a), The Public Welfare Act of 1941, as amended (Article 695c, Vernon's Texas Civil Statutes), is repealed.

Sec. 27. EFFECTIVE DATE. This Act shall take effect January 1, 1976.

Sec. 28. EMERGENCY. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

S. B. No. 965

W P Hobby
President of the Senate

Speaker of the House

I hereby certify that S. B. No. 965 passed the senate on May 16, 1975, by a viva-voce vote; May 31, 1975, senate refused to concur in house amendments and requested appointment of Conference Commiteee; June 2, 1975, house granted request of the senate; June 2, 1975, senate adopted Conference Report by the following vote: Yeas 15, Nays 14, one present not voting.

Charles Schnabel
Secretary of the Senate

I hereby certify that S. B. No. 965 passed the house, with amendments, on May 31, 1975, by the following vote: Yeas 86, Nays 58; June 2, 1975, house granted request of the senate for appointment of Conference Committee; June 2, 1975, house adopted Conference Report by the following vote: Yeas 81, Nays 60.

Dorothy Hallman
Chief Clerk of the House

Approved:

June 21, 1975
Date

12:15 pm O'CLOCK

Dolph Briscoe
Governor

Mark White
Secretary of State